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THE
TEXAS CIVIL APPEALS REPORTS

CASES ARGUED AND ADJUDGED

IN

THE COURTS OF CIVIL APPEALS

OF

THE STATE OF TEXAS

DURING

JANUARY, FEBRUARY, AND MARCH, 1910.

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* Mr. Chief Justice Fisher died on the 15th day of February, 1910. Mr. Justice Key, by appointment of the Governor, qualified as Chief Justice on February 18, 1910, and Mr. C. H. Jenkins was appointed Associate Justice in place of Justice Key on the same date.

WRITS OF ERROR.

The dockets of the Supreme Court show action upon applications for writs of error in cases reported in this volume as follows:

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Atchison, Topeka & Santa Fe Railway Company v. Seeger, 525 . . ..Refused.
Austin v. Jackson Trust & Savings Bank, 155.....Refused.

Bond v. Garrison, 620 .....Refused.

Carter-Kelly Lumber Company v. County of Angelina, 310...Refused.
Clemmer v. Price, 84 .....Refused.
Coats v. Blanding, 334 .....Refused.
Continental Casualty Company v. Deeg, 35.....Refused.

Dowell, Administrator, v. Collin County National Bank of McKinney, 244 .....Refused.
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Garth v. Stuart, 391 .....Refused.
Getzendaner v. Trinity & Brazos Valley Railway Company, 486 . . ..Refused.
Girardeau v. Perkins, 552 .....Refused.
Guderian v. Clark, 248 .....Refused.

Houston Electric Company v. Faroux, 232.....Refused.
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TEXAS CIVIL APPEALS REPORTS.

JANUARY, 1910.

NAT WETZEL v. M. W. SATTERWHITE.

Decided January 24, 1910.

1.—Trespass—Joint Tort Feasors—Liability.

The act of entering and building a fire in a house, although the same was open and unoccupied, without the consent of the owner, is a trespass and would render any and all parties participating therein or aiding, abetting, inciting, encouraging or directing the same by conduct or words, liable for the consequences proximately resulting therefrom, as, for instance, the burning of the building; and this, without regard to any question of negligence on their part. Nor did it matter that other persons on other occasions had committed trespass by entering and using the same house without the owner's consent.

2.—Same—Destruction of House—Measure of Damage.

In a suit for the value of a house set on fire and destroyed by trespassers, the measure of damage would be the difference between the value of the premises just before and just after the destruction of the house. Where the house was old, testimony as to the price of new lumber would be irrelevant.

3.—Same—Ownership—Evidence.

In a suit against trespassers for the value of a house burned by them, the owner may give oral testimony as to his ownership.

4.—Appeal—No Brief for Appellee—Practice.

In the absence of a brief for appellee the appellate court may take as true the statement from the record in appellant's brief as to the evidence and that it constitutes all the evidence in support of the verdict.

5.—Tort—Insufficient Evidence.

In a suit against several trespassers for the value of a house alleged to have been burned by them, evidence reviewed and held insufficient to connect appellant, one of the trespassers, with the making of a fire in the house which caused the house to burn. The mere statement by the witnesses that "they" or "we" did or said so and so, with nothing to indicate that it referred to all of the party, would not be sufficient to support a verdict against any particular one.

Error from the District Court of Houston County. Tried below before Hon. B. H. Gardner.

W. H. Ward and *Porter Newman* for appellant.—When a tort is committed by one, and others are sought to be held in damages with the party creating the tort by reason of directing, entering or suggesting, it must be shown that the party in committing the tortious act, acted upon the suggestion or direction of the party or parties sought to be held, and that the act was the result of a common design or understanding, and that the parties suggesting, entering or inviting would have been interested or benefited by the commission of the tortious act. Meadows v. Truesdell, 56 S. W., 932; Hyde v. Cooper, 26 Vt., 552; 1 Cooley on Torts (3d ed.), pp. 213 and 214, secs. 145 and 146.

(Third Assignment of Error.)—The court erred in refusing to give to the jury defendant's special charge No. 1, which is as follows: "You are instructed that the uncontroverted evidence in this case shows the defendants Porter Newman and Nat Wetzel are not liable in this case, and you are instructed to return a verdict for them, because the evidence showed that the defendants Newman and Wetzel did not tell Badu, or anyone else, or engage in any conversation relative to the building of a fire in said house, and that they had no knowledge that same was to be done, and had no interest in the building of a fire in said house." Meadows v. Truesdell, 56 S. W., 932.

(Fourth Assignment of Error.)—Plaintiff must show occupancy of land, or title from sovereignty of the soil at the time the alleged damages accrued, before he can recover. Western U. Tel. Co. v. Hearne, 7 Texas Civ. App., 70, 71, and authorities there cited; City of Lafayette v. Wortman, 107 Ind., 404.

Where damages result from the commission of a tort through the spread of fire, one sought to be held liable for such damage though not present, must first be shown to be guilty of negligence or contributory negligence in the kindling or the spread of said fire. Cooley on Torts, sec. 700, p. 1221; Am. Enc. of Law, p. 407, sec. 4; Martin, Wide & Fitzhugh v. Texas & P. Ry. Co., 87 Texas, 117; St. Louis S. W. Ry. Co. v. Knight, 41 S. W., 416, 20 Texas Civ. App., 477; International & G. N. R. Co. v. Timmerman, 61 Texas, 660; 1 W. & W., secs. 651 to 655; Brown v. Brooks, 21 L. R. A., 255 (leading case); Meadows v. Truesdell, 56 S. W., 932; Hewey v. Nourse, 54 Me., 256; Bachelder v. Heagan, 18 Me., 30.

(Sixth Assignment of Error.)—The court erred in failing to give to the jury defendant's special charge No. 6, which is as follows: "You are charged that the mere fact that the defendants told N. J. Badu to build a fire in said house is not of itself negligence or contributory negligence, and if you find that this is the only act which connects these defendants with the burning of the house, then you are charged to find for the defendants E. B. Hale, Nat Wetzel and Porter Newman." Because the only evidence which tended to connect defendants with the burning of said house was the statement of Badu, and this statement only connected the defendants Newman and Wetzel by innuendo.

(Eighth Assignment of Error.)—The court erred in failing to charge the jury that although defendants Wetzel and Newman were present,

if they did not direct or suggest to the defendant Badu, or were not interested in the building of a fire in plaintiff's house, they would not be liable, because the evidence on this point was contested, and the defendants were entitled to have the same submitted to the jury."

(Ninth Assignment of Error.)—The court erred in allowing the witness Brown to testify to the market value of lumber at a point ten miles east of Crockett, in Houston County, Texas, and taking as a basis the price of lumber at Westville and Groveton, in Trinity County, thirty miles away, because it was shown that the witness had not been in said community where the damage was complained of for a period of two years, and it was shown that there was a sawmill in said community ten miles east of Crockett where the market was being located. Fort Worth & New Orleans Ry. Co. v. Wallace, 74 Texas, 584; Pacific Express Co. v. Lasker Real Est. Assn., 81 Texas, 81.

(Tenth Assignment of Error.)—The court erred in permitting the witness Satterwhite, plaintiff in the case, to testify, over defendant's objection, that he was the owner of the land and premises described in plaintiff's petition, because it is a conclusion of law to be drawn from a given statement of facts—this being a suit for damages to realty. Gilbert v. Odum, 69 Texas, 673; Mooring & Lyon v. McBride, 62 Texas, 312; Herndon v. Davenport, 75 Texas, 462; Hickman v. Gillum, 66 Texas, 314.

No brief for appellee.

REESE, ASSOCIATE JUSTICE.—This is an appeal from a judgment for plaintiff in a suit instituted by M. W. Satterwhite against Nat Wetzel and several others for damages for burning a house belonging to plaintiff. Damages were laid at $1450. Upon trial, with the assistance of a jury, there was a verdict for plaintiff against all of the defendants, except one who was dismissed, for $414.12, upon which judgment was entered. This appeal, by writ of error, is by Nat Wetzel. No briefs have been filed for appellee.

The facts briefly are that on or about December 16, 1907, appellant Wetzel, together with four other gentlemen, started out from the town of Crockett to go some ten miles into the country for the purpose of hunting birds. In the party were Badu, Hale, Newman, Forbes and Wetzel. Near where they were to begin their shooting was the house which was burned, which belonged to Satterwhite. Arriving at or near this house the parties stopped, dismounted and prepared for the hunt. Badu declined to hunt, and said he would stay at the house until the parties returned. As the weather was cool he went into the house, whether before or after all of the other parties left does not appear conclusively, and built a fire in the fireplace. The gate to the yard fence was down and the door to the house open, and there were signs that the house had been used by campers. After the parties had all left, Badu discovered that the house was on fire, and lacking any means to get on the roof, it was destroyed. The other parties hearing the alarm given by Badu came up before the house was entirely consumed, and tried to put out the

fire, but were unable to do so. The only evidence tending to connect Wetzel with the building of the fire in the chimney will be shown under the assignments of error, that there is no evidence to support the verdict and judgment against him.

It was not error to charge the jury that if Hale, Wetzel and Newman, or either of them, without the consent of Satterwhite, invited, directed or suggested to Badu that he enter the house and build a fire, either or all of said parties so entering, directing or suggesting would be liable for the damages. The charge, however, is not accurately worded. We assume that the court intended to say that all persons "so advising, directing or suggesting" instead of all persons "so entering, directing or suggesting" would be liable. Merely suggesting and advising Badu to go into the house, without any suggestion or advice to build the fire, would not render such person so liable. It could not be reasonably anticipated that from such suggestion or advice Badu would build the fire, and this principle was recognized in the charge. The act of entering and building a fire without Satterwhite's consent was a trespass, without regard to any question of negligence, and rendered any of the parties participating therein or aiding, abetting, inciting, encouraging or directing by conduct or words the building of the fire, liable for the proximate consequences. (28 Am. & Eng. Ency. of Law, 566-7; 1 Waterman, Tres., sec. 23; Wolf v. Perryman, 82 Texas, 120.) The first and second assignments of error presenting the point are overruled.

It was not error to refuse the instruction requested as set out in the third assignment. If it had referred to appellant Wetzel alone, we think it should have been given. Nor did it matter that the owner was not at the time in actual possession of the house, or that other persons had committed trespass by entering and making use of the same without the owner's consent. That it was appellee's house was sufficiently shown by uncontroverted evidence. The fourth assignment is overruled.

The fifth and sixth assignments are overruled without further discussion, except to say that it was not a question of negligence at all. It did not at all matter how careful the parties causing the fire may have been.

The requested charge referred to in the seventh assignment should have been given. There was some evidence that the person or persons who told or suggested to Badu to make a fire, did not tell him to build a fire in the house.

The eighth assignment is overruled. If error at all, it was a mere omission in the charge and should have been supplied by a requested charge.

We are inclined to think that it was error to admit, over objection, the testimony of the witness Brown as to the price of new lumber, as set out in the ninth assignment. The true measure of damages, as submitted in the court's charge, was the difference between the value of the premises just before and just after the destruction of the house. It was quite an old house, considerably out of repair. We can hardly see how the price of new lumber at the time of the fire

would assist in determining the amount of damage, according to the measure stated in the court's charge.

There was no error in the admission of the testimony of Satterwhite as to his ownership, as set out in the tenth assignment.

The eleventh assignment assails the verdict and judgment as being without evidence to support them, and must be sustained as to the appellant Wetzel. There being no briefs on file for appellee, we are required to take as true the statement from the record in appellant's brief as to the evidence and that it constitutes all the evidence in support of the verdict. If appellee was not satisfied with the correctness of this statement he should have filed a brief denying its correctness and setting out such evidence, if there is any in the record. (Rule 31, 40, 41; 94 Texas, 660-1-2.)

We have, however, on account of the meagre statement following this assignment examined the record carefully and we fail to find any evidence tending in any legitimate way to show that appellant, either by himself or acting with either or all of the other parties, had anything to do with the making of the fire in the house or with advising, directing or suggesting to Badu to make such fire. There were five persons in the party. The only testimony on this point for appellee is that of Badu and the testimony of T. B. Satterwhite, which, although hearsay (except as to Newman and Hale), was not objected to on that ground, and must therefore be considered, as to what Newman and Hale told him. Neither of them mentioned Wetzel's name as having either had anything to do with building the fire or with suggesting that Badu build one in the house. The statement that "they" or "we" did or said so and so, with nothing to indicate that it referred to all of them, in view of the fact that there were four persons there in addition to Badu, is not inconsistent with the entire innocence of Wetzel, who can not be condemned for his silence alone when any of the others spoke. It might serve to create a bare surmise or suspicion of his guilty participation in the trespass, but no more, and that is not sufficient; is in fact no evidence. (Joske v. Irvine, 91 Texas, 574.)

The fire was not built for the comfort of Wetzel, nor is there any evidence to show that he shared in its benefits. The evidence does not tend to show a common design, in which Wetzel shared. He can not be condemned on the principle illustrated by the story of old dog Tray, simply because he was in bad company. The evidence should show, or at least tend to show, that he did something by way of encouragement, advice or suggestion which led, or helped to lead, to the building of the fire, or that there was a common design or purpose of which he knew and in which he participated, that a fire be built in the house, and this must be shown by something more definite than statements that "we" or "they" did so, without indicating that by such language all of the persons present were meant.

We are of the opinion that the judgment should be reversed and the cause remanded, and it has been so ordered.

Reversed and remanded.

FRANK REINA v. HUGH HAMILTON ET AL.

Decided January 26, 1910.

Vendor and Vendee—Contract—Abstract of Title.

Where the evidence shows affirmatively that in the contract for the sale of land the vendor did not agree to furnish to the vendee an abstract of the title, his failure to furnish such abstract was not a breach of his contract to sell, and upon refusal by the vendee to take and pay for the land, the vendor was at liberty to sell to any other party.

Appeal from the District Court of Harris County. Tried below before Hon. Chas. E. Ashe.

C. E. & A. E. Heidingsfelder, for appellant.

Baker, Botts, Parker & Garwood, for appellees.

McMEANS, ASSOCIATE JUSTICE.—Appellant Frank Reina brought this suit against appellees Hamilton and G. Giaccone for the recovery of certain land situated in the city of Houston, alleging that the land had been purchased by Hamilton for him, Reina, but that the said Hamilton had thereafter refused to execute to him a proper deed and furnish him an abstract of title to the land, but had sold the same to appellee Giaccone, who purchased with notice of the fact that Hamilton had bought the property for appellant.

Hamilton in his answer denied that he had purchased the property for the account of appellant, and alleged that he purchased it for himself and thereafter agreed to sell it to Reina for a price agreed upon between them; that Reina demanded an abstract of the title from him which he refused to furnish, and that thereupon Reina refused to purchase the property.

Giaccone alleged in his answer that he bought the property from Hamilton without notice of any claim of Reina, paying a valuable consideration therefor.

The case was tried before a jury and resulted in a verdict and judgment for appellees. Reina's motion for a new trial was overruled and he prosecutes this appeal.

The evidence in the record justifies the following conclusions of fact: Certain land in the city of Houston, known as the "Green Tree" property, was owned by a relative of Hamilton. Reina desiring to purchase it, and his previous efforts to buy from the owners having proven fruitless, he requested Hamilton to buy it for him. At that time Reina had on deposit with the Houston Ice & Brewing Company, of which Hamilton was president, a sum of money in excess of the amount Hamilton afterwards paid for the land, for which Reina held the company's promissory notes, and Hamilton was authorized by Reina to pay for the land out of this fund. Hamilton agreed to buy the property and sell it to Reina; and thereafter did purchase it, paying for it with his own money and taking the deed in his own name. Afterwards he made out a deed conveying the land to Reina, for a consideration agreed to by Reina, but which exceeded

the amount paid by Hamilton, which deed he delivered to Reina. After keeping the deed awhile he returned to Hamilton, bringing the deed with him, and demanded an abstract of the title, which Hamilton refused to furnish to him. Thereupon Reina refused to accept the deed and take the property. His testimony on this point, quoting his language, is as follows: "If he would give me an abstract I would buy the place. Until Mr. Hamilton did furnish an abstract I was not willing for Mr. Hamilton to take the money. I wanted the thing straight; I would not take the property; I wanted things straight; I was not willing to take the property until Mr. Hamilton gave me an abstract. I am willing to pay as long as he gave me an abstract; if he gave me no abstract, I did not want to take it." It appears that Hamilton never agreed to furnish an abstract to Reina.

The testimony tends to prove that the deed tendered to Reina by Hamilton was not signed, but no objection was made by Reina on that account, but he refused to take the property and complete the transaction solely on account of Hamilton's refusal to furnish him an abstract of the title. There is nothing in the evidence to indicate that Hamilton was not willing to sign and acknowledge the deed had Reina been satisfied with its form.

When Reina refused to take the property he was tendered and received the money deposited by him with the brewing company, and surrendered the note of the company he held.

Several of the assignments of error urged by appellant for a reversal are not presented in accordance with the rules and for that reason will not be considered, and those properly presented will not be considered in detail.

The evidence showing affirmatively that Hamilton did not agree to furnish to Reina an abstract of the title, his failure to furnish was not a breach of his agreement, nor did it authorize Reina for that purpose to repudiate the agreement to take and pay for the land, and Reina having repudiated his agreement, Hamilton had the right to sell it to Giaccone or anyone else, and to vest the title in him regardless of any notice the purchaser may have had at that time of the negotiations between Hamilton and Reina.

We think that the judgment rendered in the court below was the only one that could have been properly rendered under the facts, and the judgment is therefore affirmed.

Affirmed.

S. A. INGRAM ET AL. V. W. G. TURNER ET AL.

Decided January 26, 1910.

1.—Nuisance—Abatement—Material Injury.

In order for an individual to obtain equitable relief for abatement of a public nuisance, such as an encroachment upon the sidewalk by a building of a proprietor of lots adjoining his own, he must show a substantial and special injury to him thereby, different from that to the public generally.

2.—Same—Finding by Jury—Case Stated.

The proprietor of a city lot and business house sued the city and an adjoining proprietor for the abatement of a nuisance created by the latter, with acquiescence of the city, in erecting a show window in front of his establishment, encroaching fifteen inches upon the sidewalk and alleged to interfere with travel thereon and with the view into and from plaintiff's establishment. Held that, in the absence of a statement of facts, a finding of the jury that the structure complained of did not materially depreciate the market or rental value of plaintiff's premises was conclusive upon the appellate court, and was ground for denying the relief sought, though some interference, of the character alleged, necessarily resulted from such structure.

Appeal from the District Court of Tarrant County. Tried below before Hon. W. T. Simmons.

John W. Wray, for appellant.—Appellants had a vested right in the legal and dedicated use of the street, which could not be appropriated by Turner nor granted away by the city by ordinance or otherwise. First Natl. Bank v. Tyson, 39 So., 560; Freud v. Forbes, 102 N. W., 740; McMillan v. Klaw, 95 N. Y. Supp., 365; Costello v. State, 35 L. R. A., 305; Callahan v. Gilman, with Judge Freeman's note, 1 Am. St., 840; Reimer's Appeal, 100 Pa. St., 182; Hyde v. County, 2 Gray, 267; People v. Harris, 67 N. E., 788; Field v. Barling, 37 N. E., 853; Kalteyer v. Sullivan, 18 Texas Civ. App., 488; Heard v. Connor, 84 S. W., 605; Corsicana v. Zorn, 97 Texas, 317; Davis v. Austin, 22 Texas Civ. App., 460; Street v. Leete, 65 Atl., 373; Elliott on Roads and Streets (2d ed.), sec. 645 et seq., also 695, also 703. The whole question tersely and clearly stated, 27 Am. & Eng. Ency. (2d ed.), p. 158.

It was the duty of the court on his own findings to have rendered a judgment for the appellants, requiring Turner to remove the obstructions. Costello v. State, 35 L. R. A., 305; First Natl. Bank v. Tyson, 39 So., 560; Freud v. Firbes, 102 N. W., 740; Kalteyer v. Sullivan, 18 Texas Civ. App., 488.

Capps, Cantey, Hanger & Short, for appellee.—A municipal corporation by authority delegated to it from a Legislature either by special charter or a general law has the power to permit merchants within its limits by a general ordinance that is reasonable in character and general in application, to use a portion of the sidewalk for the display of goods. Articles 419 and 426, Revised Statutes of Texas; Elliott on Roads & Streets, secs. 653, 424, 425, 450, and authorities cited; Dillon on Municipal Corporations (3d ed.), secs. 658, 680, 683, 688, and authorities cited; 27 Am. & Eng. Enc. (2d ed.), 158, sec. 5, and authorities cited; Livingston v. Wolf, 136 Pa. St., 519, 20 Am. St., 936; Wormser v. Brown, 149 N. Y., 163, 43 N. E., 524; Hawkins v. Sanders, 45 Mich., 491, 8 N. W., 98; Hoey v. Gilroy, 129 N. Y., 132; Cushing v. Boston, 128 Mass., 330, 35 Am. Rep., 383.

In order for an individual to maintain a suit to abate a public nuisance both as against the party maintaining the alleged nuisance and the municipality which permits it, it must be alleged and proved that such individual suffers a special distinct and peculiar injury,

different in kind from that suffered by the general public. Elliott on Roads and Streets, secs. 664, 665, 690, and authorities cited; Wood on Nuisance, sec. 655, and authorities cited; Joyce on Nuisance, sec. 218, and authorities cited; High on Injunctions, secs. 522, 523, 533, and authorities cited; Dillon on Municipal Corporations (3d ed.), sec. 661, and authorities cited; City of San Antonio v Strumberg, 70 Texas, 366; Hulse v. Powell, 21 Texas Civ. App., 471.

The injury must be serious and material. High on Injunctions, sec. 552; Hinchman v. Paterson, 86 Am. Dec., 253.

KEY, ASSOCIATE JUSTICE.—S. A. Ingram, joined by her husband, brought this suit against W. G. Turner and the city of Fort Worth for the purpose of abating an alleged nuisance. The alleged nuisance is a structure which the defendant has erected on the front of his business house, and what is commonly called a show window. The plaintiffs own an adjoining house and lot, and they alleged in their petition that the structure referred to interferes with the travel on the sidewalk and with the view to and from the plaintiffs' property, and with egress and ingress thereto and renders the same less attractive and greatly impairs its market and rental value. The plaintiffs alleged that they had made demand upon the city of Ft. Worth to abate the alleged nuisance, which it had refused to do, and had undertaken to legalize the same by agreeing to accept from Turner a stipulated annual rent for the use of so much of the street as was occupied by the structure complained of.

The city answered by a demurrer and a general denial. Turner's answer included special exceptions, a general denial, and pleas of limitation.

By agreement of the parties the trial judge made findings upon all the issues, except those submitted to the jury, and his findings are as follows:

"1. That S. A. Ingram is the owner in her own estate of lots 8, 9, 10, 23, 24 and 25 in Block C-1, Daggett's addition to the city of Fort Worth, Tarrant County, Texas, having acquired the title thereto May 31, 1899; said property fronts on Main Street seventy-five feet, running back to Rusk Street 200 feet, on which there is erected a three-story brick and iron business building; that immediately on the south of it defendant Turner owns 75 x 200 feet, on which was constructed, more than fifteen years ago, and is still standing, a brick and iron business building; both houses front west on Main Street.

"2. That Main Street is the principal business street of the city of Fort Worth; that more than 10,000 people live south of this property, and their chief means of communication with the city is Main Street; that the depot of the Texas & Pacific Railway Company is within 300 feet of the property, fronts west on Main Street, and out of this is operated more than fifty passenger trains daily; that the travel to and from the depot is along Main Street; that Main Street was dedicated to the use of the city as a street and public highway by E. M. Daggett, more than thirty years ago, and has been

steadily used ever since said time as such; it has been paved twice with different materials, now permanently with vitrified brick; that the sidewalk in front of the property is twelve feet wide; originally the sidewalk was ten feet wide, but by city ordinance regularly passed the width was permanently established at twelve feet.

"3. In September, 1905, defendant erected or rebuilt a structure or show window attached to the west end of his building out into the sidewalk from the property line fifteen inches by seventy-five feet, which rests on the sidewalk and is fourteen feet high; there is a doorway in the center of about five or six feet in width; that this structure is called a bay window sometimes, a show window sometimes, but was erected for the purpose, and is so used, of displaying the merchandise of the tenants occupying this building and advertising their business as the one built in 1899 had been used; that the one so built in 1899 occupied the same space as the one built in September, 1905; the first was continuously used as a show window until the rebuilding of the new one; the new one cost in connection with the awning, about $4,500; it is composed chiefly of plate glass with the points of connection of said glass made of strips of ornamental iron, is attractive in appearance, but occupies the sidewalk west of the property line fifteen inches by seventy-five feet along the sidewalk, by fourteen feet in height.

"4. The two buildings are flush with each other and built flush on the property line; that plaintiffs have show windows constructed in their building within eight inches of the property line. Their building was erected in 1900 and 1901 as a place for the conduct of a wholesale and retail business; has been occupied for such purpose since its erection. At the time of the trial and before that time, plaintiffs' tenants occupying their building used and had been using, movable show cases built of glass and which were used to display goods and advertise their business, and which were set on the sidewalk immediately in front of plaintiffs' building, and which occupied sixteen or eighteen inches of the sidewalk in front of plaintiffs' said building and immediately next to the west front thereof. The windows are about sixteen inches to two feet square, about six feet high, are on rollers.

"5. During the time the defendant was erecting his show windows on the sidewalk, plaintiffs' tenants complained and demanded a similar structure for their purposes; that plaintiffs appealed to the mayor and the city council of the city of Fort Worth to require the removal of defendants' improvements; the city council refused to act. Plaintiffs appealed to the city attorney, who refused to do anything, but notified J. C. Ingram, who was representing the plaintiffs, that if he erected a similar improvement he would be prosecuted under a city ordinance (not the one above referred to) then in force, but since repealed. This finding relating to the repeal by the city is found alone against the city.

"6. I find that at the time of the trial of this cause, and for fourteen years theretofore, there was and had been in force an ordinance which had been regularly passed by the city council of the city of Fort Worth, containing the following provisions:

"'Section ——. Merchants, etc., allowed certain space. It shall hereafter be unlawful for any merchant, trader, broker or other person to occupy for the display of goods or otherwise more than eighteen inches of any sidewalk of any street, which space shall be taken on the inside of such sidewalk; provided, however, that butchers shall be allowed eighteen inches on the outside of the sidewalk.

"'Section ——. That it shall be unlawful for any person or persons to maintain or allow to be maintained in connection with their premises any sign or other thing not an awning which rests on or upon any street or sidewalk of the city of Fort Worth, or projects from any building in such a manner as to overhang any street or sidewalk of the city of Fort Worth, to an extent exceeding eighteen inches from the property line.'

"A further section of said ordinance provided that any person violating the two foregoing provisions should be guilty of a misdemeanor, and fined in any sum not less than five nor more than one hundred dollars; and further provided, that each and every day shall constitute a separate offense and punishable as such.

"It is the agreement of the counsel for both parties that any reference to the special charters granted by the Legislature of Texas can be had, made or taken from the special Acts of the Legislature of Texas, granting such charters to the city of Fort Worth.

"7. Plaintiffs instituted their suit February 8, 1906, against the defendant, and on July 30, 1907, by amended pleading, the city of Fort Worth was made a party, defendant having theretofore, after the commission form of government was established, made a demand upon the mayor and commissioners to require the removal of the obstructions so erected by the defendant. They declined to act. Subsequently thereto, defendant proposed to lease this portion of the sidewalk of fifteen inches by seventy-five feet from the city, and pay an annual rental of $75 a year. The city, by resolution of date September 7, 1907, accepted the proposition.

"8. That there is a double line of street railway on Main Street on which cars pass about every five minutes; that the Northern Texas Traction Company operates the line and also operates an interurban line between the city of Fort Worth and the city of Dallas, Texas; that this line is operated over Main Street, and deflects to the east to Dallas on Front Street, which is south of the plaintiffs' property, between it and the Union Depot; that it maintains a station in the building fronting west on Main Street immediately south of defendant's building and between it and the said depot; the system is excellently managed and passenger traffic heavy. There is a fifteen foot alley between Turner's building and the only one south between Turner's and the Texas & Pacific depot."

In response to special issues the jury found that the maintenance of the show window in question by the defendant Turner does not materially exclude air from the plaintiffs' premises, nor materially exclude the view from or to the front thereof, nor materially interfere with ingress to and egress from the plaintiffs' building; and that it does not and will not materially depreciate the market or rental value of plaintiffs' property. The jury also found that the structure com-

plained of was located at the same place and upon the same ground of a former and similar structure which was erected in May, 1899, and was maintained until it was replaced in September, 1905, by the structure complained of.

Upon the foregoing findings of the judge and jury a judgment was rendered for the defendants and the plaintiffs have appealed.

While it is true that an individual citizen, in a proper case, may obtain equitable relief for the abatement of a public nuisance, yet in order to do so he must show a substantial and special injury to him, different from that to the public generally. Therefore, while an obstruction in a public road or street may constitute a public nuisance, for the abatement of which the government may maintain an equitable action, it does not follow that an individual citizen can obtain such relief merely by proof of the existence of such nuisance. He must go further and prove that it causes special and material injury to some property right of his. In this case appellants contend that they met that requirement by proof of the fact that the show window complained of encroaches fifteen inches upon the street, and thereby, on account of its proximity to their property, necessarily interferes with the view to and from the same. The jury found, as a fact, that the obstruction of the view referred to is not material. No statement of facts has been brought up with the record, and therefore we can not know what testimony was submitted to the jury upon that question, other than the physical facts consisting of the locations of the plaintiffs' and the defendants' lots, buildings, show windows, etc. It may be conceded that the show window complained of will, necessarily and to some extent, obstruct the view to and from the front of the plaintiffs' premises; but witnesses, including the plaintiffs themselves, may have testified that such obstruction was slight and immaterial. Besides, the extent of the obstruction of the view from appellants' building depends upon the number and location of doors and windows in that building, and that information is not disclosed by the record, though it may have been by the evidence. If that building has but one front door and it is sixty feet from appellee's building, the show window on the latter will not obstruct near as much view from that door as would be the case if the door was located within ten feet of appellee's building, for it is a matter of common knowledge that the nearer an object is to the eye the more it curtails the range of vision.

In view of these conditions, it is not believed that this court should disregard the finding of the jury to the effect that the obstruction of the view to and from the plaintiffs' premises is not a material obstruction.

This disposes of the contention relied on for a reversal, and renders it unnecessary for us to decide several points urged on behalf of appellees in support of the judgment.

No reversible error has been shown and the judgment is affirmed.

Affirmed.

Writ of error refused.

JOHN MEZLAR v. THE CITY OF MILES ET AL.

Decided January 26, 1910.

Nuisance—Abatement.

A horse which, the owner being absent, became down and helpless in a livery stable with an incurable disease and offensive to the neighborhood, constituted a nuisance which demanded abatement, and neither the city, its officers, nor individuals, incurred liability to the owner by having it killed and the body removed and burned.

Error to the County Court of Runnels County. Tried below before Hon. B. B. Stone.

Lee Upton, for plaintiff in error.—If a person wilfully destroys the personal property of another without his knowledge or consent, he is a trespasser and is liable for at least nominal damages therefor. Champion v. Vincent, 20 Texas, 816; Brown v. Bridges, 70 Texas, 664; Farrar v. Talley, 68 Texas, 352; Heiligman v. Rose, 81 Texas, 226; Nafe v. Hudson, 19 Texas Civ. App., 381.

J. B. Wade, for defendants in error.

FISHER, CHIEF JUSTICE.—This is a suit by the plaintiff in error against the city of Miles, Geo. S. Graves, George W. Reader, J. W. Hinkle, A. H. Dillinger and S. M. Scott, to recover damages for a horse killed by defendants, owned by the plaintiff, alleged to be worth $250; also to recover exemplary damages in the sum of $250.

The case was tried before the court without a jury and judgment entered that the plaintiff, John Mezlar, take nothing by reason of his suit, and that the defendants recover their costs.

On the second page of plaintiff in error's brief is a statement to the effect that it is admitted by him that the city of Miles would not be liable for the acts of its officers, as the basis of the suit was a tort committed by the mayor and the aldermen of the city and the city marshal and a livery stable keeper; but the plaintiff does contend that the individuals named are liable under the findings of fact by the court for at least nominal damages, and on this the plaintiff in error relies for a reversal of this case. There is no statement of facts in the record, but it comes up to this court on the following findings of fact and conclusions of law of the trial court:

Conclusions of fact.—"1. I find from the evidence that plaintiff was the owner of the horse, for the loss of which this suit was filed, and that some two or three weeks prior to December 19, 1907, he placed the horse with defendant S. M. Scott for keeping and attention, for hire, in Scott's public livery stable in the town of Miles, Runnels County, Texas, and that Scott was given no authority with reference to the horse, except to feed and properly care for him during the absence of plaintiff from the county.

"2. That about ten days prior to December 19, 1907, the horse became seriously sick with bladder and kidney trouble, and after two

or three days was down practically all the time, unable to get up on his feet, and that within two or three days after he got down, the horse in his struggles caused large sores to form in all places on his body where he came in contact with the ground, from which he contracted blood poison four or five days before December 19, when he was killed.

"3. That defendant Scott procured the services of a veterinary surgeon, who could do nothing for the horse, which for three or four days prior to December 19, was unable to get on his feet.

"4. That the sore places on his hips and legs rotted out to the bone, the odor of which became very offensive to passersby on the street and to occupants of other buildings within one-half city block.

"5. That Scott's livery stable was located on one of the principal business streets of the town, and the horse lay within five or six feet of the sidewalk. That various citizens of the town complained to the town authorities concerning the condition and offensiveness of the horse, and defendant Scott, on December 19, called upon the city authorities to take the horse off his hands, on which date the mayor of the town, defendant Geo. S. Graves, and two aldermen of the town, defendants Reader and Hinkle and the town health officer held an informal conference and instructed the city marshal, defendant Dillinger, to kill the horse and burn his carcass, which was done by him on the afternoon of December 19, with the consent and at the request of the defendant Scott, but without the consent or knowledge of plaintiff, who was in a distant county and knew nothing of his horse's condition.

"7. That the horse was in a dying condition at the time he was dispatched, and would have lived only a few hours, if left alone.

"8. I further find from the overwhelming weight of evidence that the horse was absolutely valueless at the time he was killed, and that therefore plaintiff suffered no damages by reason thereof.

"*Conclusion of law.*—1. I find that in view of the facts detailed above, that neither of the defendants, A. H. Dillinger, who killed the horse, nor the other defendants who advised him incurred any liability to plaintiff herein."

It is admitted by the plaintiff in error, and it is clear from the facts, that he sustained no actual damages, that the horse was worthless and practically dead when he was killed by the defendants; but the contention is that the killing was without his consent, and therefore unlawful, and from that fact alone a trespass was committed, and he is at least entitled to nominal damages. But an answer to this contention consists in the fact that it is apparent that the horse in its then condition was a public nuisance when killed; and it is clear from arts. 447 and 462, and possibly other articles upon that subject of the Revised Statutes, that the city had the right to summarily abate and abolish a nuisance of this character, which was calculated to affect the public health or the comfort of the inhabitants of the city; and that by the second article cited, the city had the right to have the same removed. The animal at the time of its destruction could practically be regarded as dead. It was in a very

offensive condition, to such an extent that the inhabitants of the town complained of it. It would have been inhuman to have undertaken to remove the horse while he was alive, and it was an act of humanity upon the part of the defendants to kill the horse and relieve him from his then evident suffering, knowing as they did that the horse was suffering from an incurable disease and was down and helpless, and that it was a matter of a short time until he would die. The owner was not present and he could not be appealed to in order to get his consent that the means resorted to could be taken in order to abate the nuisance and relieve the animal in his then condition, which the facts clearly showed to be of such an offensive nature to the inhabitants of the city as likely to affect their comfort and the public health.

We find no error in the record and the judgment is affirmed.

Affirmed.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY v. JAMES R. SENN.

Decided January 26, 1910.

1.—Master and Servant—Explosion of Boiler—Negligence—Proof.

In a suit for damages for personal injuries caused by the explosion of a boiler, it is incumbent on the plaintiff not only to prove that the explosion was due to a defective boiler, but also by direct or circumstantial evidence that the defective condition was capable of being known to defendant upon the proper performance of the duty of inspection.

2.—Same.

In a suit for damages caused by the explosion of a boiler, it being shown by the testimony that the explosion was due either to low water in the boiler or to a defective boiler, and the jury having discarded the theory of low water, circumstantial evidence considered, and held sufficient to support a finding by the jury that the explosion was due to a defective condition of the boiler, and that said condition could and would have been discovered by a proper inspection.

3.—Same—Negligence—Charge—Practice.

Where the court required the jury to find that the defendant was guilty of negligence in putting plaintiff in control of an engine with a defective boiler before they could render a verdict for plaintiff, the charge was sufficient on the subject of negligence, and the defendant could not complain of the same in the absence of a request that the jury be instructed in any particular detail of the subject.

Appeal from the Fifty-Seventh Judicial District, Bexar County. Tried below before Hon. A. W. Seeligson.

Baker, Botts, Parker & Garwood, D. C. Bolinger and *W. F. Ezell,* for appellant.

Perry J. Lewis and *H. C. Carter,* for appellee.

JAMES, CHIEF JUSTICE.—An action for damages for personal injury. The amended petition of Senn alleged that while he was act-

ing as engineer on one of defendant's freight trains, and when it reached a point about seven miles west of Uvalde, the boiler of the engine exploded, and he sustained thereby serious and permanent injury. "That the boiler in its bolts, stays and the various parts by which the boiler was held together, was defective, unsafe and unfit and dangerous, and were too weak to stand the strain which was necessarily placed upon them," and by reason of such dangerous and unsafe condition the boiler exploded, and that it was negligence on the part of defendant to have and permit said boiler to be and remain in said condition.

The petition alleged that he was carrying no more than the usual and proper amount of steam, and that the boiler was supplied with the usual safe and proper quantity of water, and denied that plaintiff permitted the water in the boiler to become too low and to thereby burn the crown-sheet of the boiler, as alleged in defendant's answer. Also alleged that the defective and unsafe condition of the boiler was hidden from his view while he was operating the locomotive, and that he did not know of its said condition; and that defendant negligently failed to make a proper and careful inspection of same to the end that its condition might be discovered, which, if such inspection had been made, would have discovered its defective and unsafe condition, which acts of negligence led to the explosion. That the explosion caused the locomotive to overturn, and plaintiff received the injuries which the petition sets forth.

The demurrers contained in the answer need not be noticed, as the brief presents no question in reference to them. There was a general denial, and a special denial that defendant failed to properly inspect. The answer also charged that the explosion was caused by plaintiff's conduct and want of care in failing to keep the engine properly supplied with water, and in permitting the water in the boiler to get below the top of the crown-sheet while the engine had a hot fire in the fire-box; and also negligent in this, that after permitting the water to get below the crown-sheet and after allowing the crown-sheet to get extremely hot he then negligently forced water into the boiler, which was converted immediately into steam as soon as it reached the hot crown-sheet, and on this account the sudden increase of pressure in the boiler blew the crown-sheet down and caused the explosion. A verdict of $15,000 was returned.

The first assignment of error complains of the refusal of a peremptory instruction. The basis for this complaint is embodied in one proposition as follows:

"In an action by an employe for injuries caused by the explosion of the fire-box of the engine which he was operating, the mere happening of the accident is insufficient to raise a presumption of negligence on the part of the company, and where there is no evidence, as in this case, which tends to show that the explosion of the fire-box was due to any negligence on the part of the railroad company, it is the duty of the court to instruct a verdict for defendant. The court, therefore, erred in refusing to give appellant's special charge No. 1, which was, in effect, a peremptory instruction to find in its favor."

The proposition, therefore, is that there was no evidence which tended to show that the explosion was due to any negligence of defendant. The argument is that the testimony shows that explosions of this kind result from one of two causes, low water in the boiler, or defective boiler, and that plaintiff having proved nothing except the explosion, and, by his own testimony, that the water did not get too low, the jury should have been instructed as asked, for the reason that such state of evidence does not establish negligence on the part of the defendant. Counsel are mistaken as to the above being all the evidence before the jury, as we shall hereinafter explain.

The principles of law which govern cases like this between master and servant are that it is incumbent on the servant to prove more than that the explosion took place and that it was due to a defective boiler. He must go further and show that the defective condition of the boiler was due to negligence of defendant. To simply establish that the explosion came from some defect in the boiler, would not be enough, because it could come from a latent defect, which is one that the exercise of ordinary care can not discover. Plaintiff must produce further testimony, direct or circumstantial, from which the jury will be able to say that the explosion was caused by a defective boiler, and its defective condition was capable of being known to defendant upon a proper performance of the duty of inspection which it, as master, owes to its servant.

The rule applicable as between carrier and passenger is not applicable. Nor is this rule any different from that declared in the case of McCray v. Galveston, H. & S. A. Ry., 89 Texas, 168, which was a master and servant case, but there the very circumstance of the occurrence was such as was held to carry with it evidence of culpable negligence of the master. This court has expressed itself on this subject generally in Galveston, H. & S. A. Ry. v. Garven, 50 Texas Civ. App., 245 (109 S. W., 426).

It is clearly the result of all the testimony that the explosion was due either to low water in the engine, for the consequences of which plaintiff would have been responsible, or to a defective boiler. Notwithstanding the great volume of opinion evidence which points to low water at the time of the accident as the cause, there can be no question that the jury had before them ample testimony to support a finding by them that there was no such condition, therefore no such cause. We think it needless to relate the testimony and the circumstances in this record which warranted the jury in making, as they must have done, such finding.

The next step is to gather from the evidence, if possible, what the defect or defective condition of the appliance was, since the jury had the right to find and must have found that from such cause alone the explosion came about. There was evidence in the color and appearance of the metal and pit mark indentations disclosing that the crown-sheet had been subjected to excessive heat which tended to weaken it; also evidence disclosing that the heads of the crown bolts had been burnt off, particularly on the front and where a number of the witnesses by their opinion located the place where the break

occurred; also disclosing four broken stay bolts; also disclosing some cracks in the metal of the side sheets. Much of the testimony bearing on these defects is found in the statements of the witnesses for appellant, for each and all of these defects were consistent with and tended to prove appellant's main contention at the trial, which was that the explosion was due to the effect of heat in the absence of a sufficient supply of water, all of the evidence showing that if the water was allowed to get too low just such effects were likely to be produced. A number of experts, therefore, testified that it was evident to them that this explosion resulted from low water.

But the low water theory was laid aside by the jury, and this cause of the explosion being out of the way, the same effects were utilized by appellee by the aid of testimony going to show that they weakened the boiler and made it insufficient to resist the ordinary pressure, and that they existed prior to the sending out of the engine on this trip, and that a proper inspection would have prevented this occurrence.

As to the color or discoloration of the metal, the witness Mooney testified that the blue color of the crown sheet was an indication of the sheet having been heated to a very high temperature; also that by overheating this boiler steel that is used in crown sheets it weakens the sheet, the sheet loses its tensile strength if you get it up to a white heat. This was an oil burner and it was proved that it makes an intense white heat. A witness, Spencer, and other witnesses, testified that the crown-sheet had pit marks caused by overheating and sediment which tended to weaken the metal, and he testified further: "As to whether that crown-sheet is safe or not safe, it is according to the pressure you carry on it; over 200 pounds pressure it is not safe, I wouldn't have it." Plaintiff testified that he was working about 200 pounds of steam, which is the usual and customary steam pressure on engines of that class, and that this was a safe steam pressure. The evidence showed that the sheet was torn by the break. It seems to us that it is not necessary for us to state anything further from the evidence in this connection, for if the above was accepted by the jury, they had the right to conclude from it that the crown-sheet was defective in resisting power to the point that it was dangerous to subject it to the ordinary pressure used in operating the engine; and further, that this was not, as a matter of law, a hidden condition. In this place we should add that this condition of the crown-sheet, which, if it existed, clearly was shown to have resulted from the action of intense heat in connection with low water, did not originate during this trip, if the jury believed certain of the testimony. The defendant's witness, Ney, testified: "If the crown-sheet had been properly covered by two and a half gauges of water (plaintiff testified he had this) and they had been using the proper quantity of steam (which fact was also testified to) and she had exploded it would have been bound to be from some defect in the boiler. It ought to be from some defect in the boiler, if there was no low water."

As to the crown bolts, stay bolts and cracks, we shall quote from several of the witnesses. The witness Hellman stated: "At the time this boiler exploded there were four broken stay bolts in the boiler.

. . . We found these two on the right and two on the left side; I don't remember the locations. I did not make a note of it. One end of these bolts was broken from the outside sheet like they always do, just like we find them when we make the hydraulic test; we found the usual break, the break that we commonly found we found in four of those stay bolts. . . . I could tell that these four broken stay bolts were broken prior to the explosion because the appearance of the bolts showed it, the ends being corroded, that is what they call alkalied over, they were scaled and showed that they were old breaks. Those broken stay bolts there were plainly observable to any experts examining that boiler, and a proper test would have disclosed those broken stay bolts. . . . If we had known that those stay bolts were broken, we would have taken them out."

The defendant's witness Bryan testified as follows: "I found three broken stay bolts in this fire-box that were not broken by this explosion. . . . With reference to the location of the three stay bolts that I found broken, I found one bolt on the right side sheet about the fourth row from the top and the third bolt from the flue sheet, and then two in the left side sheet in the second row from the top and the third bolt from the flue sheet, and then two in the left side sheet in the second row from the top and the thirteenth and eighteenth bolts, commencing at the flue sheet and counting your bolts one, two and so on." Mr. Mooney testified that a broken bolt would tend to weaken the fire-box if it was around that part of the boiler; it tends to weaken wherever a bolt is required, and our purpose is to replace every broken bolt.

There was nothing absolutely certain as to where the fire-box gave way first. Some witness advanced the opinion by examining it, that the crown-sheet gave way at the front end where it joined on to the flue sheets. As the jury inspected the fire-box and saw it for themselves as evidence, their conclusions on the subject are not known. The general trend of the testimony is that the break, or giving way, occurred in the forward end of the fire-box.

As to the condition of the crown bolts, the witness Stevens testified: "If the bolt heads get burned off by the heat it certainly has an effect on the crown-sheet, because it weakens it. If a large number of these crown bolts get their heads burned off, the result will be that the sheet is liable to come down." The witness Ney testified: "I made an examination to determine the cause of the explosion. It looked to me like the cause of it was the crown-sheet was overheated without water, the crown bolts, the heads of them were all burned off; in fact, all burnt off on the front end, in front of the crown-sheet." Recurring to the testimony of plaintiff, which the jury has credited, the conditions that existed while he had charge of this engine on this trip, did not cause these bolt heads to be burned off, and such condition was open to view, and was there prior to the time this engine was delivered to plaintiff. It is observable also that the witnesses seem to agree in their opinions that the breaking took place in the forward part of the fire-box, though none profess to be exact about the point.

As to cracks, it was shown there were a few of them which had been

repaired in the usual way by plugging, and at least one that had not been. Witnesses testified that cracks tend to weaken the metal, which is something which everyone knows is so, where the crack is; but the evidence by the witnesses seems to be that there was no breaking at any crack; still if cracks weakened the sheet, it may be that this was a cause of the sheet giving way.

The crown sheet and the side sheets were composed of one piece of metal. Its condition, as shown by the foregoing and much other testimony of like kind, was weak and defective in various respects. It had previously been subjected to extreme heat, to such a degree that it was thereby discolored and to some extent weakened, one witness stating that it was so weakened by this cause and by indentures made by pit marks that he did not consider it safe for a pressure more than 200 pounds, which plaintiff testified was about the pressure he was carrying. It seems to us that it would not be due care, as a matter of law, to furnish an engineer with an appliance unfit to stand a pressure of anything over 200 pounds when the usual pressure in operating the engine is approximate to that. Certainly, if the appearance of the metal itself gave notice such as above stated to one familiar with engines and boilers, an inspection by competent employes in that line would have had such matter suggested to them also, upon an inspection of it. Such notice would have suggested the propriety of a test with that defect in view, such as the hydraulic test, and it appears that no such or similar test was made before sending out this engine in that condition, though an inspection was testified to.

It is further clear that there was evidence that there existed other imperfections in this appliance which were in their nature apparent, and which weakened its resisting power, and which it was customary to remedy by inspection and repair between trips. We refer to the burnt-off heads of numerous crown bolts and the several broken stay bolts, which the jury were authorized to find were in this condition when this engine was sent out. If they caused or contributed to this accident, there can be no question that the jury had sufficient warrant in finding that defendant had failed, in this particular also, in its duty of inspection.

After following the brief of appellant we find ourselves unable to consider that because the evidence leaves the particular defect which caused this explosion uncertain, that no case is presented. We think in such a case that if, upon the whole evidence, a theory of fact could, consistently with the evidence, be said to exist, which would exonerate the defendant from negligence, plaintiff's case would fail for lack of proof. But nothing can be more clearly established than, in this case, the fact that plaintiff not having low water, this explosion came from a defective engine and from no other cause. It is not claimed that there was any latent defect, and the development of all the evidence obtainable from all sources shows no such thing as a latent defect and renders none probable, but various defects, all open and visible to ordinary inspection, and all in their effect tending in the direction of an explosion of the boiler by weakening its capacity for resistance. The jury were, we think, authorized to con-

clude and find that from the defective condition of the appliance in general, its weakened material, its burnt-off crown bolts, and its broken stay bolts, that it was unsafe for the purpose it was given plaintiff to use, and that its explosion was the result of such defective condition, and that defendant was guilty of negligence in this matter, and to such negligence plaintiff's injury was due. We, therefore, overrule the first assignment.

For the same reasons we overrule the assignments from three to nine, inclusive, and also the eleventh.

Appellant's second assignment complains of this paragraph of the charge: "If you believe from the evidence that on or about the 21st day of February, 1908, . . . the boiler of said locomotive exploded; and if you further believe from the evidence that the boiler of said locomotive was defective, as alleged by plaintiff in his petition, and that such defects, if any, in said boiler directly caused the explosion of said boiler, if you find it did explode; and you further believe from the evidence that such defects in said boiler, if any, were caused by defendant's negligence, and that such negligence, if any, directly caused the explosion of said boiler, . . . then I charge you that your verdict must be for the plaintiff."

The proposition is: "There was no evidence whatever showing or tending to show that all of the defects, as alleged in the petition, existed in the boiler at the time of the explosion, and the court's charge in submitting said issues to the jury was therefore misleading and not warranted by the evidence."

The allegation was as follows: "Plaintiff avers that said boiler and its bolts, stays and the various parts by which the boiler was held together, were defective, unsafe and unfit and dangerous, and were too weak to stand the strain which was necessarily placed upon them, and by reason of such defective, unsafe, dangerous and unfit condition, said boiler exploded and caused plaintiff to be injured as herein stated, and it was negligence on the part of defendant to have and permit said boiler to be and remain in such defective, dangerous, unfit and unsafe condition."

We agree with appellant's argument to the extent of holding that the submission by the court of an issue not raised by the evidence is error. Appellant bases this assignment upon the entire want of evidence that the bolts and stays were unfit, unsafe, defective and dangerous and too weak to stand the strain placed upon them, and adds: "Where is there one particle of evidence that there were any defects whatever in the boiler?" What we have said amounts to a definite finding that there was such evidence, and if this is correct it follows we must overrule this assignment. On this subject we may add that if plaintiff had alleged several defects in the boiler some of which were proved and one not, still it would not follow that the charge in the form of this one was error, necessitating a reversal as misleading. See Missouri, K. & T. Ry. v. Hay, 39 Texas Civ. App., 51 (86 S. W., 955), in which case the Supreme Court refused a writ of error. Moreover, it might be said that such a submission in those circumstances would be too onerous on plaintiff.

The tenth assignment complains of this paragraph of the charge:

"If you believe from the evidence that on or about the 21st day of February, 1908, the plaintiff was in the employ of the defendant as an engineer on one of its locomotives, and that on said date the boiler of said locomotive exploded; and if you further believe from the evidence that the boiler of said locomotive was defective as alleged by plaintiff in his petition, and that such defects, if any, in said boiler directly caused the explosion of said boiler, if you find it did explode; and if you further believe from the evidence that such defects in said boiler, if any, were caused by defendant's negligence, and that such negligence, if any, directly caused the explosion of said boiler, if you find it did explode; and if you further believe from the evidence that by reason of such explosion of said boiler, if there was an explosion of said boiler, the plaintiff directly received any of the injuries alleged in his petition; and if you further believe from the evidence that the plaintiff was not guilty of contributory negligence; and if you further believe from the evidence that the plaintiff did not assume the risk, then I charge you that your verdict must be for the plaintiff."

The proposition is that this authorized the jury to return a verdict for appellee without requiring them to find that appellant knew, or by the exercise of ordinary care would have discovered the defect, if there was any defect, which caused the explosion of the fire-box. The charge required the jury to find, before finding for appellee, that defendant was guilty of negligence in respect to the defects. This comprehended the subject of negligence of defendant in general. Had it been desired that the jury should be instructed in any detail of this subject, such an instruction should have been asked. Another proposition is that there was no evidence tending to support said issue, which we overrule in view of what has been stated in this opinion.

The twelfth complains of the amount of the verdict as excessive. There was testimony concerning plaintiff's injury which, if credited by the jury, fully warrants the verdict. Judgment affirmed.

Affirmed.

Writ of error refused.

EL PASO & SOUTHWESTERN RAILROAD COMPANY v. JOE WELTER.

Decided January 26, 1910.

1.—Master and Servant—Scope of Servant's Duties—Question of Fact.

While it is a correct proposition of law that negligence of a railroad company can not be predicated on moving a train of cars without notifying an employee who is engaged in an act on and about the cars for which he was not employed, in the absence of evidence that the company knew or ought to have known of the perilous situation of the employee, the refusal of a requested charge involving said proposition is proper when to give it would involve an assumption that the employee was not in the line of his duty when injured, said fact being an issue under the pleading and evidence.

2.—Same—Contributory Negligence—Question of Fact.

The question of contributory negligence is one of fact, the burden of proving which is upon the defendant who alleges it as a defense, and unless

the state of the evidence is such that no fair minded man of ordinary intelligence can reach any other conclusion from it than that the party charged with it was guilty, which can very rarely be the case, such question must be determined by the jury.

3.—Same—Assumed Risk.

The servant never assumes the risk of his master's negligence unless he is chargeable with notice of the same and can reasonably anticipate a concomitant danger, and the burden is on the master to prove such knowledge.

4.—Same—Danger Signal—Rule Construed.

Rule of a railroad company requiring a blue flag by day and a blue light by night to be displayed at one or both ends of a train of cars when workmen are under or about it, held to have no application to a case wherein the foreman of a switch engine, before moving a train of cars, went under one of the cars which was marked "in bad order," to ascertain whether it could be coupled and moved.

5.—Same—Duty to Warn Servant.

The principle that it is not the duty of the master to warn a servant of danger unless he knows or by the exercise of ordinary care ought to know the danger to which the servant is exposed, has no application to a case where the danger arises and the injury is caused from the negligent act of the master himself or of those whose negligent acts are attributable to him.

6.—Trial—Issues—Irrelevant Charge.

A special charge which ignores the real issue made by the pleading and evidence and upon which the case was tried, is properly refused.

7.—Evidence—Matter of Inducement—Leading Questions.

It is generally permissible to ask a witness a leading question for the purpose of ascertaining whether the witness is qualified to testify about the matter in issue.

8.—Same—Leading Question—Test.

The generally applied test in determining whether or not a question is leading, is, does the question suggest the desired answer?

Appeal from the District Court of El Paso County. Tried below before Hon. James R. Harper.

Patterson, Buckler & Woodson, for appellant.

Patterson & Wallace, for appellee.

NEILL, ASSOCIATE JUSTICE.—This suit was brought by Joe Welter against the El Paso & Southwestern Railroad Company, the El Paso & Northeastern Railroad Company, and the El Paso Terminal Railroad Company to recover damages for personal injuries.

The plaintiff alleged, substantially, that the defendant companies were, on July 15, 1908, jointly and severally engaged in the business of operating in the city of El Paso a large number of railway tracks in their yards in said city, and employed a large number of switchmen and other employes whose business was to switch cars and make up trains in the usual course of business conducted by them; that on and prior to said date plaintiff was employed by the defendants, or at any event by the El Paso & Southwestern Railroad Company, and engaged in switching cars and making up trains in said yards under

the direct supervision of defendants, or in any event under the direct supervision of the last named defendant; that on said day he was ordered by the yard master in charge of said yards to switch a caboose and another car attached to the end of a string of cars standing on track No. 2, and after removing the caboose and other car, to transfer the remaining cars to the yards of other railroad companies; that after receiving such order it was his duty, before moving said cars, to look them over for the purpose of ascertaining whether they were in a condition to be moved, and that in going to the rear end of the string he discovered that the coupling appliance of the rear car was out of order, and, for the purpose of finding out whether the drawhead could be used in moving it, he went under the car to examine it, and that while doing so defendant's servants negligently struck the other end of the string with other cars with such force and violence as ran them against him before he had time to escape injury therefrom, by reason of which his hand and arm were injured, etc.

The defendants' answers consisted of a general denial, and special denial of any acts of negligence, and pleas of contributory negligence and assumed risk. The plaintiff having dismissed his suit as to all the defendants except the El Paso & Southwestern Railroad Company, the case as between plaintiff and said company was tried before a jury and the trial resulted in a verdict and judgment in favor of plaintiff for the sum of $9,000.

Conclusion of facts.—As the first assignment of error complains that the court erred in refusing to charge the jury at defendant's request, that under the pleadings and evidence in this case their verdict must be for the defendant, and the propositions advanced thereunder involve conclusions on every essential controverted issue of fact in the case, our disposition of the assignment will be determined by our conclusions of fact upon the main issues. The propositions asserted under the assignment are as follows:

"1. Negligence of a master can not be predicated on the movement of cars without notifying a servant engaging in an act for which he was not employed, in the absence of evidence that the master knew the servant was under or about the car moved, or in the exercise of ordinary care and prudence ought to have so known.

"2. Aside from appellee's failure to use the blue flag as required by appellant's rule, the evidence was conclusive that plaintiff's injury resulted entirely from his own negligence, or at least that his own negligence proximately contributed to cause his injuries.

"3. The evidence showed that plaintiff assumed the risk, as a matter of law, of being injured as he was.

"4. Appellant having provided and promulgated a rule which, if obeyed by appellee, would have protected him from injury, should not be made to respond in damages for an injury resulting from appellee's failure to obey such rule."

They will be considered in the order presented.

1. This proposition, while good law in a case to which it is applicable, is not sound in its application to the case in hand. Its vice lies in assuming that the appellee, when injured, was "engaging in an

act for which he was not employed." This assumption involves an issue of fact made by the pleadings and evidence, which it was within the exclusive province of the jury to decide, and it would have been an invasion of a domain in which it had no right and an usurpation of authority for the court to have taken the question from the jury and have decided it, which would have been done had the requested charge been given.

2. Laying aside for the present the question as to whether the plaintiff's failure to use the blue flag was negligence—to be considered when we come to pass upon the fourth proposition—we will first observe that the question of contributory negligence is one of fact, the burden of proving which is upon the defendant who alleged it as a defense; and that unless the state of the evidence is such that no fair-minded man of ordinary intelligence can reach any other conclusion from it than that the party charged with it was guilty of such negligence (which can very rarely be the case), such question must be determined by the jury. When, in view of this principle, the evidence is read and considered, it can not be said that it is conclusive that plaintiff's injury resulted entirely from his own negligence or that his negligence proximately contributed thereto.

3. The servant never assumes the risk of his master's negligence, nor of such negligence as is chargeable against the master, unless he has or is chargeable with notice of such negligence and can reasonably anticipate its concomitant danger. Such negligence of the master being shown as imposes a risk upon his servant not ordinarily incident to his employment or materially adds to or enhances a risk that is, the burden rests upon the master to prove that his servant who has been injured by such negligence knew or was charged with knowledge of such negligence and could have reasonably anticipated its attendant danger. There being evidence reasonably tending to show that defendant, or its servants operating them, was negligent in the excessive force used in propelling the cars which struck the string, to which the one whose drawhead plaintiff was examining was attached, it can not be said as a matter of law that plaintiff assumed the risk of such negligence.

4. The rule referred to in this proposition is as follows: "26. A blue flag by day and a blue light by night displayed at one or both ends of an engine, car or train, indicates that workmen are under or about it. When thus protected it must not be coupled to or moved. Workmen will display the blue signals and the same workmen are alone authorized to remove them. Other cars must not be placed on the same track so as to intercept the view of the blue signals, without first notifying the workmen."

It is apparent from the rule itself, in view of the evidence, that it has no relation or application to the kind of work plaintiff was doing when he was injured. He was not engaged as a workman on the car, but as the foreman of the switch engine in ascertaining whether the drawhead was in such condition, or could be placed in such condition and position, that it could be used in making such coupling as would enable him to move the car in obedience to the order given him by the yard foreman. It is not shown, nor is it

reasonable to suppose, that a switchman, in making such an examination, even when it becomes necessary to get beneath the end of a drawhead to do so, is required or expected to place such signals as are designated in the rule, for his protection; for this would necessarily cause such great delay in making and breaking up trains and in placing and distributing cars upon the proper tracks and sidings, as would render such service impracticable, if not impossible, without changing the entire system under which such switching is done in railroad yards. The car had already undergone such inspection, which was made by another employe, as was necessary to determine whether it was in such condition as to require repairs, and had been found to be in bad order. It was not for the purpose of making a like inspection that plaintiff was engaged in examining the drawheads, for he knew that such inspection had been made and the car marked in bad order, and that for that reason he had been ordered by the yardmaster to remove it from the track it was on to the one he was ordered to place it on; but, as has been before stated, for the purpose of ascertaining whether it could be so moved by the use of its defective drawhead.

We, therefore, overrule the assignment and all the propositions asserted under it. And in doing so, find as matters of fact: (1) That the defendant was guilty of the negligence alleged and that such negligence was the proximate cause of plaintiff's injuries; (2) that plaintiff was not guilty of any negligence proximately contributing to his injuries; (3) that his injuries were not caused by any risk assumed by him as ordinarily incident to his employment; and (4) that he did not disobey the rule of defendant above referred to.

Conclusions of law.—1. The special charge requested by defendant, the refusal of which is the subject of the second assignment, is not applicable to that theory of the case, arising from the pleadings and evidence, upon which it was submitted to the jury. The principle that it is not the duty of the master to warn a servant of danger unless he knows, or by the exercise of ordinary care ought to know, the danger to which the servant is exposed, has no application to a case where the danger arises and the injury is caused from the negligent act of the master himself or of those whose negligent act causing the injury is attributable or chargeable to him. The real issue upon which this case was tried was not whether the defendant knew or could have known by the exercise of ordinary care that plaintiff was exposed to the danger of being injured in the way he was; but whether defendant's employes were guilty of negligence in throwing the cars in on the west end of track No. 2 with such force or speed as to move the entire string of thirty-five or forty cars thereon, thereby injuring plaintiff, who was in the discharge of his duty in examining the coupling of the rear car of the string, which was furthest from the point of impact. To have given the requested charge would have been to ignore this issue entirely, which was the only one upon which plaintiff relied after the evidence was closed and which the court presented in its charge to the jury.

2. Special charges Nos. 7 and 8, the refusal of which is the basis of the third and fourth assignments of error, are embraced in the

tenth and twelfth paragraphs of the main charge, which states the law as clearly and as favorable to the defendant as it is enunciated in the refused special charges referred to in said assignments. Therefore, we overrule both of said assignments of error.

3. The fifth assignment of error complains of the eighth paragraph of the court's charge, which is as follows:

"If you believe from the evidence, and a preponderance thereof, that the plaintiff was employed by defendant, the El Paso & Southwestern Railroad Company, on the 15th day of July, 1908, and that while in the line of his duties in such employment (if any) he was directed by W. E. McGraw, the yardmaster, to switch certain cars to another track; and that in order to properly switch said cars (if any) it became necessary and was a part of his duty to inspect the drawhead of one of said cars; and that in so inspecting said car (if he did) it was necessary for him, plaintiff, to get under the said car in a stooping position, as alleged, to inspect the drawhead thereof, and that he did so place himself under the said car; and you further believe and find that while plaintiff was under the car (if he was), as alleged, that the defendants' employes, in working another engine, switched eight or ten cars against the opposite end of the train of cars with unusual and unnecessary force and violence, and that because thereof the wheel of the car under which plaintiff was, caught plaintiff's hand and arm, and that he was thereby injured; and you further believe and find that such act of switching the cars (if any) was negligence upon the part of the defendants' employes, as the term negligence has been defined to you above, and that such negligence (if any) was the direct and proximate cause of the accident to plaintiff and his injury (if any), and that the plaintiff himself was not guilty of negligence and did not assume the risk, then and in that event, your verdict will be for the plaintiff. If you do not so find, your verdict will be for the defendant."

The propositions under the assignment interpose these objections to said paragraph: (1) That it singles out and places before the jury the question whether the cars were switched with unusual and unnecessary force and violence, thereby presenting an issue not made by the pleadings; (2) that in submitting whether or not the cars were moved with "unusual and unnecessary" force and violence, it was upon the weight of the evidence; (3) that in submitting whether or not the cars were switched with "unusual and unnecessary"' force and violence, it sought out and gave undue prominence to certain portions of the evidence; and (4) by presenting the question whether the cars were moved with "unusual and unnecessary" force and violence, it had a tendency to lead the jury to believe that, in the opinion of the court, the moving of the cars with "unusual and unnecessary" force and violence would constitute negligence.

The paragraph is not obnoxious to any of the objections. That it is not to the first is obvious from these allegations in plaintiff's petition:

"That while they were engaged in moving the car and placing other cars back on track No. 2, they made what is known as a running switch, or threw a string of cars back in on track No. 2 at a very

rapid and dangerous rate of speed, and with great force and violence, and with sufficient force and violence to move all the cars, about forty-five in number. That the employes were guilty of negligence in switching the cars and throwing the same back on track No. 2 at such a rate of speed, and with such force and violence as to move all the other cars then located on track No. 2. That if the employes in charge of said other engine had exercised due care in switching or running said cars in on track No. 2 in a careful and proper manner and at a proper speed, the force of contact of said two strings of cars would not have been of sufficient force to move said string of cars on which plaintiff was working." That it is not open to any other of the objections is apparent from the paragraph itself, when read and considered in the light of the pleadings and the evidence.

4. The sixth assignment complains that the eighth and ninth paragraphs of the charge were misleading in that their tendency was to lead the jury to believe that if the cars were switched with "unusual" or "unnecessary" force they should find the defendant guilty of negligence. We have already, in disposing of the fifth assignment, copied the eighth paragraph of the charge. Here is the ninth: "If you believe that the employes of the defendant company did not switch the eight or ten cars with unusual and unnecessary force and violence against the car under which plaintiff was located, and those against it, then there was no negligence, and your verdict will be for the defendant."

We can perceive no such tendency as is urged against the charge; for each paragraph, as well as both considered together, clearly leaves the question of negligence *vel non* to the determination of the jury, without intimating in the least any opinion of the court upon it, or how it should be decided.

5. We overrule the seventh and eighth assignments. Neither of the questions complained of by them suggested the desired answer to the witness, which is the generally applied test in determining whether a question is leading. Each question was asked for the purpose of ascertaining whether the witness was qualified to testify about what was claimed to be a prevailing custom in the yards where plaintiff was at work in regard to moving and switching cars, and it can hardly be perceived how the witness could have been lead up to the point of inquiry by a question framed in any other form. It is generally permissible to ask a witness a leading question for such purpose. Therefore, if either of the questions should be regarded as leading, it was permissible and not obnoxious to the principle upon which the rule inhibiting leading questions is founded.

6. There was no error in the court's overruling the defendant's motion for a new trial upon the ground embodied in the ninth assignment of error. Rule 26 therein referred to was evidently not intended to apply to switchmen or other employes who, for their own safety and the safety of others engaged in the same business, were required to examine the cars when switching in defendant's yards, but was intended to be applied for the protection of car inspectors and car repairers while engaged in the duty of their employment.

7. Special charge No. 12 was properly refused, because substantially embraced in the main charge. What we have held in disposing of the foregoing assignments requires that all others not specifically mentioned be overruled.

There is no error in the judgment and it is affirmed.

Affirmed.

Writ of error refused.

FRANK X. BALL ET AL. v. SAMUEL BELDEN, ADMINISTRATOR.

Decided January 26, 1910.

1.—Sale of Land—Rescission.

It is a general rule in this State that when a vendor of land has received part of the purchase money and gives indulgence after default in payment of another part of the purchase money, there must be a demand of payment and notice of an intention to rescind the contract before advantage could be taken of the default and a rescission had.

2.—Same.

The remedy by rescission of a contract for the sale of land is not favored, and slight circumstances, when indicative of a purpose not to insist on that remedy, may be treated as a waiver of the right.

3.—Same—Case Stated.

A note was given for part of the purchase money of land in 1897 and became due in 1899; the payee lived in a foreign country and it was not known by the payor where the note was kept; after the lapse of nine years demand was made by letter for payment, to which the payor replied promising to give the matter attention in a few days; thereupon payee brought suit for collection of the note, and the payor came into court and offered to pay the note, less the interest which payor claimed had been waived by the original vendor, the plaintiff then changed the suit to one of rescission and for recovery of the land. Held, the defendant was not in default and the recovery should have been denied.

4.—Same—Right to Defend.

The mere fact that a vendee or one holding under him denies the right of the vendor to recover the full amount sued for would not give the vendor the right to rescind the contract of sale.

5.—Same—Tender—Offer to do Equity.

An offer by defendant to do equity, when sued for a balance of purchase money of land, is sufficient to defeat a rescission although no money was actually paid into court.

6.—Tender.

When the plaintiff in a suit upon a purchase money note does not pray for attorney's fee, a tender by the defendant need not include such fees.

7.—Contract—Waiver of Interest.

The words "without interest" in a note or other contract mean only that no interest shall be charged until after maturity; thereafter the legal rate will be charged.

Appeal from the District Court of Bexar County, Thirty-Seventh Judicial District. Tried below before Hon. Edward Dwyer.

C. C. Clamp and *S. S. Searcy*, for appellants.—The court erred in

taking the case from the jury, and declaring that defendants had forfeited the contract. Tom v. Wollhoefer, 61 Texas, 277; Heirs of Reddin v. Smith, 65 Texas, 26; Milligan v. Ewing, 64 Texas, 258; Estell v. Cole, 62 Texas, 695; Moore v. Giesecke, 76 Texas, 543; Phillips, Guardian, v. Herndon, 78 Texas, 378; Pierce v. Moreman, 84 Texas, 596; Mason v. Bender, 97 S. W., 715; Moore v. Brown, 46 Texas Civ. App., 523.

Anderson & Belden and *Geo. C. Altgelt*, for appellee.—Appellant's offer to pay $3000 did not defeat plaintiff's right to a rescission of the contract, because: 1. The partial release or gift from Juana F. Montes de Flores to Antonio Cadena released only the interest accruing from the date of the note to its maturity, on May 20, 1899, and not any interest subsequent to that date.

2. Because on April 1, 1908, appellee, administrator by his attorney, made a demand on appellants, which appellants, by letter of April 6, 1908, refused by answering that it would receive attention in a few days.

3. Because, on same day, April 6, appellee, by filing this suit, made a judicial demand on appellants, to which they made no reply or tender.

4. Because the offer of $3000 is manifestly insufficient in amount for this, that appellants refuse to pay either interest, attorney's fees or costs, all of which had accrued.

5. Because appellant's offer embraces the conditions that the release must come from the court and must be approved by her attorney.

6. Because appellants pleaded the general denial which is inconsistent with a plea of tender or offer to pay. Estes v. Browning, 11 Texas, 237; Walsh v. Ford, 27 Texas Civ. App., 573; Polk v. Kyser, 21 Texas Civ. App., 676; Pierce v. Moreman, 84 Texas, 596; Rutherford v. Mothershed, 42 Texas Civ. App., 360; Lanier v. Foust, 81 Texas, 186; Stone Land & Cattle Company v. Boon, 73 Texas, 548; Crain v. National Life Ins. Co., 120 S. W., 1098.

FLY, ASSOCIATE JUSTICE.—This is a suit instituted by appellee, as administrator of the estate of Juana F. Montes de Flores, deceased, against F. X. Ball and Mary Fest. The original suit was on a promissory note for $3000, executed by Antonio F. Cadena to Juana F. Montes de Flores for part of the purchase money of certain land, a vendor's lien being reserved in the deed to secure the payment of the note. After appellants had filed an answer admitting the execution of the note by Antonio F. Cadena, but setting up that the interest specified in the note had been set aside and released by Mrs. Flores to Cadena, and they were ready, able and willing to pay the $3000 without interest, appellee filed an amended petition in which he sought to recover the land and in the alternative prayed for judgment on the note. J. P. Hickman and O'Farrell were made parties defendant, but were dismissed by the court. The cause was tried by jury and under instruction of the court a verdict was returned in favor of appellee for the land.

The facts are without contradiction and show Juana F. Montes de

Flores, a *feme sole,* had title to 579 5/10 acres of land, about twelve miles south of the city of San Antonio, on the San Antonio River, and on May 17, 1897, conveyed the same to Antonio F. Cadena for $895 cash and a note for $3000, due two years after date, with interest at the rate of six percent per annum and attorney's fees and reserved a vendor's lien to secure payment of the note. Four days after the execution of the deed and note, Mrs. Flores executed to Antonio F. Cadena an instrument in Spanish, a translation of which is as follows:

"San Antonio, Texas, May 21, 1897.

"Confiding in the loyalty of my nephew, Antonio Cadena, I declare without value the consideration named in the note signed by him concerning the six percent interest on the sum of three thousand dollars that he owes me on the purchase price of the ranch." That some time in 1900 Antonio Cadena died without having paid off and discharged the note for $3000 which had become due on May 17, 1899, and his wife, Caroline E. Tarin de Cadena, qualified as independent executrix of his will. On February 26, 1903, the executrix sold the land in controversy to F. O'Farrell, for $1600 cash and assumption of payment of the $3000 note herein mentioned. In the deed was the following recital: "Also for the same consideration I hereby transfer and assign to the said F. O'Farrell the right which my said husband obtained from said Juana F. Montez de Flores by and through a certain document in writing signed, executed and delivered by said Juana F. Montez de Flores to my said deceased husband, Antonio F. Cadena, in regard to the release of payment of interest on said $3000 note, and which instrument is duly recorded in the general records of Bexar County in book volume 161, on pages 447-448, to which instrument in writing reference is hereby made and is made a part and parcel of this conveyance."

On March 2, 1903, F. O'Farrell conveyed the land in question to Frank X. Ball and Mary Fest, appellants, for the recited consideration of $2000 in cash and the assumption of the payment of the $3000 note executed by Antonio F. Cadena to Mrs. Flores. It was recited in the deed that the interest on the note had been released by the instrument hereinbefore copied, and reference was made to the place of its record. The release made by Mrs. Flores was duly acknowledged by her, and recorded on August 6, 1897. Mrs. Flores died in France and appellee qualified as administrator of her estate.

No demand was ever made for the money due on the note until about April 1, 1908, when an attorney representing appellee wrote Mrs. Fest a letter asking for a conference with her in regard to the note. In that letter it was promised that suit would be withheld until Mrs. Fest was heard from in regard to the matter. She swore that she received the letter on Saturday, April 4, and on Monday, April 6, 1908, this suit was filed. She answered the letter on that date, without knowledge of the suit, promising to give the matter attention in a few days. Appellants had at all times been ready, willing and able to pay off and discharge the note, without the interest, upon a release of the vendor's lien, but no demand was made, so

far as shown by the record, for the money, from the execution of the note until April 1, 1908. The court peremptorily instructed the jury to return a verdict in favor of appellee for the land.

The suit in this case was in effect one for a rescission of the contract of sale, and it is the rule that when a vendor has received part of the purchase money, and gives indulgence after default in payment of another part of the purchase money, there must, as a general rule, be a demand of payment and notice of an intention to rescind the contract before advantage could be taken of the default and a rescission had. Equity and fair dealing furnish a sufficient reason for the existence of such a rule. (Estes v. Browning, 11 Texas, 237; Scarborough v. Arrant, 25 Texas, 129; Hild v. Linne, 45 Texas, 476; Tom v. Woellhoefer, 61 Texas, 277; Estell v. Cole, 62 Texas, 695; Milligan v. Ewing, 64 Texas, 258; Reddin v. Smith, 65 Texas, 26; Hamblen v. Folts, 70 Texas, 134; Wright v. Dunn, 73 Texas, 293; Moore v. Giesecke, 76 Texas, 543; Phillips v. Herndon, 78 Texas, 378; Pierce v. Moreman, 84 Texas, 596.)

As said in the cited case of Moore v. Giesecke: "The remedy by rescission is not favored, and, as has been said, slight circumstances, when they may be properly treated as indicative of a purpose upon the part of the vendor not to insist on that remedy, may be treated as a waiver of the right to rescind, unless its maintenance becomes necessary to enable the vendor to enforce the payment of the consideration for which he contracted to sell the land; and when a suit for the recovery back of the land has been brought, where any portion of the purchase money has been paid or where valuable and permanent improvements have been placed upon the land by the vendee or by purchasers under him, and the defendant, when sued, brings into court and offers to pay the balance of the purchase money, with costs of suit, unless there exist strong countervailing equities, the money ought to be received and a recovery of the land denied." The principles announced are peculiarly applicable to the facts of this case. The note was given to Mrs. Flores in 1897, became due in 1899, and from the last date to a few days before the suit was instituted, a period of nine years, no effort was made, not even a demand, to obtain payment of the note. The payee of the note was in France and no one seemed to know where the note was kept. After that long period a suit was brought to recover the amount of the note, and when appellants came into court and offered to pay the note, less the interest that had been waived, the suit was changed to one of trespass to try title, and, although the uncontradicted evidence showed an ability and willingness to pay the note, a peremptory instruction was given to the jury to rescind the sale and give the land to appellee. There was no attempt to take advantage of the delay in collecting the note by pleas of limitation, or in any other way; but the same plea was interposed that would have been offered had the suit been brought in 1899, and that is that the payment of interest had been released by the payee of the note and nothing was due but the principal, which appellants tendered in payment of the note. Nothing was done to impede or delay payment of the note, unless it was such to ask for a construction of the instrument that

Mrs. Flores gave Cadena in regard to the interest. Appellants were not in default in payment of the note; it had never been presented or payment demanded. The negligence and default existed on the part of the Mrs. Flores, the owner and holder of the note.

Appellants had the right, under the facts, to have the equities adjusted between them and the representative of the vendor of the land. As said by the Supreme Court: "We understand every decision on the subject to recognize the right of the vendee to assert equities whenever the suit of the vendor is for a rescission of the contract. On the other hand, we do not understand that it was intended to decide, in the cases where the vendor brought suit simply to try title and for possession, that equities in favor of the vendee entitling him to relief would not be heard. . . . We can see no good reason why the right of the vendee to equitable relief when he is sued for the purchase money, or for the land itself, should at all depend upon the character or the form of plaintiff's suit. Whether or not he is entitled to any equitable relief will be a proper subject of inquiry in every case." Moore v. Giesecke, 76 Texas, 543.

The long delay of the vendor in asking for rescission alone would open the way for the adjustment of any equities in favor of appellants. It is a rule well established in the decisions hereinbefore cited that when the vendee is willing to perform the contract, and the vendor has received a part of the consideration, or has delayed for unreasonable time to ask for a rescission, or when for any reason it would be inequitable for the vendor to recover possession of the land, a court of equity will not permit him to do so. The rule as to delay was applied in Moore v. Brown, 46 Texas Civ. App., 523. In that case it was said: "These facts show that the appellant treated the contract as subsisting up to the institution of this suit, seven years from the time of the maturity of the first note given in payment of the land. During that time not a suggestion was made by appellant in reference to a rescission." In the case now in this court the contract was recognized as existing and the suit instituted thereon nine years after the note became due, and it was by an amendment that the suit for the land was inaugurated. There was no plea or action on the part of appellants that could have justified a change in the nature of the suit. There was never at any time any desire evinced on the part of appellants to defeat recovery on the note, as construed by them in the light of the vendor's release of the interest.

The tender made by appellants was sufficient, although no money was paid into court. They offered to do equity and that was sufficient. (Spann v. Sterns, 18 Texas, 556; Gardner v. Rundell, 70 Texas, 453.)

We do not understand that in order to obtain equities the vendee must agree to pay what is claimed by the vendor, regardless of the justice of the claim. For instance, if there had been a payment on the purchase money note which was the basis of the suit, we do not think, because the vendor desired to collect the amount of the payment again, that the vendee by insisting on being credited with the payment would lose the right to his equities. For the same rea-

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We do not understand that in order to obtain equities the vendee must agree to pay what is claimed by the vendor, regardless of the justice of the claim. For instance, if there had been a payment on the purchase money note which was the basis of the suit, we do not think, because the vendor desired to collect the amount of the payment again, that the vendee by insisting on being credited with the payment would lose the right to his equities. For the same rea-

son, if appellants believed that there had been a release of the interest they would not be denied their equities because of an unwillingness to pay the interest. They were not called upon to tender the attorney's fees, because they were not prayed for by appellee.

It is admitted by appellee in his amended petition that the instrument executed by Mrs. Flores to Antonio F. Cadena remitted the interest on the note up to the time it was due, on May 17, 1899. It has been held in this State that where a note expressly provides that it shall carry no interest that it merely refers to the time intervening between its execution and the time it is due, and unless there is express contract in plain terms that no interest shall be paid after maturity, interest will run from that date at the legal rate. If there is any doubt as to the construction of the provision in a contract as to interest, the doubt will be resolved in favor of interest. (Roberts v. Smith, 64 Texas, 94.)

It is with some degree of reluctance that the writer of this opinion subscribes to the ruling in the decision cited, that the words, "without interest," in a note has reference merely to the time before it becomes due and that from that time the note should bear interest at the legal rate. We have been able to find no authority supporting the decision. Randolph in his work on Commercial Paper, section 1713, states the same proposition, giving as authority the Texas case. Under that decision, "without interest" in a promissory note means the same as "interest from maturity." The court held that they had no effect whatever, and that the note was in the same condition as though interest had not been mentioned in it. It must be concluded that if the words "without interest" in a note mean nothing, or only that no interest shall be charged until after maturity, that the instrument given by Mrs. Flores to Cadena as to interest referred only to interest for the two years before the note was due. There is nothing in the terms of that instrument stronger or more comprehensive than the words "without interest." In view of the decision in Roberts v. Smith, we hold that the interest was only remitted to the maturity of the note and that appellants are liable for interest at six percent per annum from May 17, 1899. The construction that Mrs. Cadena and O'Farrell put upon the instrument executed by Mrs. Flores could not have any effect in indicating the intention of the parties to it. It was not shown that Mrs. Flores ever construed the instrument as a remission of all the interest.

The judgment of the lower court will be reversed, and, there being no conflict in the testimony, judgment is here rendered that appellee, as administrator of the estate of Juana F. Montes de Flores, do have and recover of F. X. Ball and Mary Fest the sum of $3000 with interest at six percent per annum from May 17, 1899, together with all costs of the lower court, and that the vendor's lien be foreclosed on the 579 acres of land described in the petition, and appellants recover of appellee all costs incurred by reason of this appeal.

Reversed and rendered.

CONTINENTAL CASUALTY COMPANY V. MRS. BERTHA DEEG.

Decided January 26, 1910.

1.—Accident Insurance—Voluntary Exposure to Danger.

An accident insurance policy contained a stipulation that where the accidental injury resulted from "voluntary exposure to unnecessary danger or obvious risk of injury," the amount payable should be one-fourth of the amount which otherwise would be payable; in an action upon the policy the evidence showed that the assured was an experienced railroad employee in active service on and about railway trains; that on the occasion of his death he was a passenger on a railway train which was nearing a station and was moving at about six miles an hour when he opened the trap door of a vestibuled coach, and as he started down the steps of the coach his feet seemed to slip and he fell off the train and was killed. Held, a peremptory instruction for the defendant was properly refused because (1) the evidence did not show that the deceased was killed while in the act of alighting from a moving train; and (2) if it did, it would not follow as matter of law that the deceased voluntarily exposed himself to danger. Whether or not there was obvious risk of injury to the deceased under all the circumstances, was a question of fact for the jury.

2.—Same.

By the expression "voluntary exposure to unnecessary danger or obvious risk of injury" as used in a policy of accident insurance, is meant that the danger must be one so logically attending the act that the assured must be conscious of it.

3.—Same—Charge.

The expression "unnecessary exposure to danger" has not the same meaning as 'voluntary exposure to unnecessary danger."

4.—Trial—Improper Argument—Practice.

Although not controlling in every case, it is the rule that when the trial court instructs the jury to disregard an improper argument and the counsel making the argument withdraws the same and asks the jury not to consider it, the argument is not sufficient cause for reversing the judgment.

Appeal from the District Court of Bexar County. Tried below before Hon. J. L. Camp.

Manton Maverick and *Onion & Henry,* for appellant.—The court erred in not granting a new trial because of its refusal to give a peremptory instruction to return a verdict for the defendant, for the reason that there was no evidence adduced in the case which tended to show any liability on the part of the defendant, the undisputed, uncontroverted evidence being that the accidental injury to deceased resulted from voluntary exposure to unnecessary danger and that the risk of injury was obvious to deceased at the time he alighted or attempted to alight from the moving train. Shevlin v. American Mut. Acc. Assn., 36 L. R. A., 54; Carpenter v. American Accident Co., 24 S. E., 502; Tuttle v. Travelers' Ins. Co., 134 Mass., 176; Keene v. New England Mut. Acc. Assn., 164 Mass., 170; Travelers' Ins. Co. v. Randolph, 78 Fed., 762; Follis v. United States Mut. Acc. Assn., 62 N. W., 809; Maryland Casualty Co. v. Hudgins, 97 Texas, 124; 1 Am. & Eng. Enc. Law, 2d ed., p. 307; Continental

Casualty Co. v. Wade, 101 Texas, 102; Diddle v. Continental Casualty Co., 63 S. E., 962.

In the case of Telephone Co. v. Burgess, 60 S. W., 1023, it is said it is no reflection upon the integrity or the intelligence of a jury to hold that they may have been influenced by improper argument of counsel even when they are told by the court to disregard such argument because the human mind is often unconsciously controlled by influences which it has striven to combat and which it believes it has overcome. In recognition of this fact the law throws around a jury every safeguard to keep their minds free from every impression except such as is produced by the legal evidence admitted in the case, and a disregard of these safeguards in the trial of a case, makes it the duty of an Appellate Court to set aside the verdict of the jury in all cases in which it is probable that such irregularity has been injurious to the party complaining of it. Galveston, H. & S. A. Ry. Co. v. Washington, 42 Texas Civ. App., 380.

"We can not say that the jury were not influenced by these remarks to the prejudice of appellant. They were calculated to influence the jury to consider improper matters in arriving at their verdict; and it must be held that they were so intended by counsel, that being the purpose of the remarks and having been made over the objection of the appellant." Gulf, C. & S. F. Ry. Co. v. McClerran, 91 S. W., 654; Galveston, H. & S. A. Ry. Co. v. Washington, 42 Texas Civ. App., 380; Western U. Tel. Co. v. Smith, 52 Texas Civ. App., 107; San Antonio Traction Co. v. Lambkin, 99 S. W., 574; Western U. Tel. Co. v. Burgess, 60 S. W., 1023; Ft. Worth & D. C. Ry. Co. v. Hays, 51 Texas Civ. App., 114; Texas & N. O. Ry. Co. v. Harrington, 44 Texas Civ. App., 386; Missouri, K. & T. Ry. Co. v. Wood, 91 S. W., 803.

Bertrand & Arnold and *Joel A. Lipscomb,* for appellee.

JAMES, CHIEF JUSTICE.—This is an action on an accident insurance policy. The policy provided among other things: "In any of the losses covered by this policy and specified in parts 1 or 11, where the accidental injury results from voluntary exposure to unnecessary danger, or obvious risk of injury, . . . the amount payable shall be one-fourth of the amount which otherwise would be payable under this policy," etc. There was a verdict for the entire amount provided in case of death.

Felix Deeg, the insured, was run over and killed by a train. There was evidence to show that he was an employe of the railway company, but at the time of this occurrence he was not engaged in his work, but was returning home on the train as a passenger. Before the train had reached the station where it was to stop, and while it was rounding a curve and going at the rate of about six miles per hour, approaching the station, Deeg, evidently meaning to get off the train at or about that point, went with his valise to the platform, which was vestibuled, raised the trap door, stepped down, shoved the door back, when he in some way fell, with the result that his body went under the wheels of the train and he was killed.

The witness Cavender testified: "I saw the man through the window coming around, and then he came and opened the trap door, and he had a valise across his shoulder with a strap across his shoulder, and as he came down about middle ways of the steps and something, I don't know if something caught him or what it was snatched him back and his feet slipped off from under him (indicating) and he fell. . . . He did not get down to the last step; he didn't swing off. Something seemed to catch him. I don't know what made him fall, if the handle, the brake handle, or catch or what caught the valise, the strap or something yanked him back and his feet kinder slipped out from under him. He was not on the last step when this occurred. He lifted up the trap door and stepped down, and after he lifted up the door, shoved the door back and he slipped. I guess something snatched him back under the car. His valise might have snatched him back when he slipped, but I didn't see it in that particular. I don't know whether the strap of that valise was broken, but the valise was off him and was open after he fell and away from the train. No, sir, I didn't see him make any attempt to get off."

Mrs. Braehmer, who was also there, stated: "As the train was coming in, going to the depot, this party steps on the platform and I think he stepped on to the second step and it seemed like his feet slipped and he got tangled up some way. He tried to balance himself and in some way he must have got tripped in his valise—he had a grip—a valise in his hand when he was coming out to get off. No, I don't think he had gotten down to the last step; he was very near on the second step. His feet slipped, or something, as far as I could see. He did not get down to the last step and swing off."

Tomas Perez stated what he saw: "The train makes a bend right there. He was getting out towards the Austin Street side. He was out on the side away from the bend. That would thrown him away from the train. He ran a little distance, the suction of the train seemed to pull him under, something must have pulled him under the train. If left alone, he would not have gotten under there. Something unusual that caused him to get under the wheels, and under any general, usual circumstances he would not have done so."

Dunham, who had ten years' service in railroading, stated that the end of the steps of a vestibuled passenger coach is about twenty-six inches from the ground, that this was within an inch or two of it, and the same distance from the rail; and "that the suction of the train wouldn't amount to anything, not a thing, wouldn't be considered by a railroad man a minute in going that fast. It would probably be sufficient to suck under a hat, but not a grip."

The evidence showed that deceased, while in the service as a fireman, had often been seen to get off the engine at about the same place.

With this testimony in the record it would have been error to give for defendant the peremptory instruction, the refusal of which is what is complained of by the first assignment. What is meant by the provision quoted in the beginning of this opinion, is fully and satisfactorily explained, with the authorities relating thereto in the recent case of Whalen v. Peerless Casualty Co., 73 Atl., 642. Certainly, if Deeg had not swung off or alighted from the train, the act

of swinging off or alighting was not involved. The testimony above quoted coming from the persons who appear to have been in a position to witness the event, if accepted by the jury, shows that Deeg from some accidental cause lost his balance before he could be said to have undertaken the act of getting off, and that this, an accident pure and simple, was what led to his death, and not any danger that lurked in the act of getting off the moving train, because such act had not been reached.

And if it had been reached and he had met his death as a result, it would not follow, as a matter of law, that he *voluntarily* exposed himself to such danger. In order for this to be, the danger must have been one so logically attending the act, that he must have been conscious of it. A train may be going so slow that no one would imagine danger in getting off, and on the other hand, it may be going so fast that everyone would realize the presence of danger in the act. This train was nearing the station and was going at what seems to have been a low rate of speed; the deceased was an experienced railroad employe, in active service on and about trains, and whether or not to such a person there was danger at all in his getting off this train at that time and place, and the train going at that speed, would have been a question proper to submit to the jury; and for better reason, the question whether or not he was conscious of the danger of what happened, for unless it was sufficiently probable to present itself to him he could not be said to have voluntarily exposed himself to it.

But this discussion is unnecessary as the jury had evidence before them to warrant them in finding that he did not step off the train at all, but by some accidental means lost his balance while on the second step of the platform and slipped from the train by reason of that cause; they could have found that from this cause, an unforeseen and casual one and not from a "voluntary exposure to danger or obvious risk of injury" which can apply only to known or obvious dangers, the man met his death. The court correctly refused to give a peremptory instruction.

The second assignment complains of the refusal of this charge: "You are further instructed that if you believe from the evidence that the deceased, Felix Deeg, while a passenger upon the G., H. & S. A. Ry. Co. on the morning of September 2, 1906, while said train was entering San Antonio, raised a trap door or platform and opened the vestibule door and started down the steps of the car for the purpose of alighting therefrom; and you further believe that while so doing he fell and was killed thereby; and you further believe that such act on his part was unnecessary exposure to danger, or that the risk of injury was obvious, then your verdict should be for the defendant."

This charge was properly refused. Defendant would not have been entitled to a verdict simply if his act was found to be an unnecessary exposure to danger. This was not the contract. The provision for nonliability, or rather for reduced liability, was a voluntary exposure to unnecessary danger. The word voluntary is important and was intended for something. To use language from the case above

quoted: "It appears therefore that a voluntary exposure to unnecessary danger or obvious risk within the meaning of the policy, is a conscious or intentional exposure to a known risk, and not a mere inadvertent or accidental one." To have given the charge asked might have led the jury to find for defendant because he was upon the platform step when he fell, with more reference to the position he occupied than to what caused him to fall. In Travelers' Ins. Co. v. Randolph, 78 Fed., 754, it was held that riding upon the platform of a car running sixteen miles an hour is not, as a matter of law, voluntary exposure to an unnecessary danger within the meaning of an insurance policy. It would seem to us, however, that when a man chooses to occupy such a position on a rapidly moving train, the dangers that are incident to and evident in such a situation, such as arise from movements of the train attending its operation, would be unnecessary dangers voluntarily assumed. But be this as it may, dangers not to be expected from occupying such a position, a person can not be said to voluntarily expose himself to. There was nothing to suggest to Deeg that he might get caught or tangled while on the step in such manner as to throw him down, though it was unnecessary for him to be on the step at that time, and it was an unnecessary exposure. The charge was calculated to cause the jury to ignore the essential feature that he consciously or voluntarily exposed himself to the particular danger which overtook him.

The court in the main charge stated: "If you find from the evidence that Felix Deeg's death resulted from an accidental injury received by him . . . and you further find that his death did not result from a voluntary exposure to unnecessary danger nor result from an obvious risk of injury to himself, then you are instructed to return a verdict for plaintiff against defendant company for the full amount sued for less $30 due on the premium for said policy."

The fourth assignment of error complains of the giving a special charge asked by plaintiff which appellant claims to have been a repetition of the above. There is a difference in the two instructions, in that the above paragraph in the main charge deals with the case generally, while the requested one has reference to the theory of Deeg being killed while attempting to alight from the steps. But there was in the main charge another paragraph charging the jury to find for defendant upon the theory of his being killed while in the act of alighting. The special instruction complained of presented the same theory conversely for plaintiff. We think no error was committed in this matter.

The seventh assignment claims that the undisputed evidence shows that in attempting to get off a moving train Deeg subjected himself to unnecessary danger and obvious risk of injury within the meaning of the policy. We overrule this and for reasons refer to the discussion already made.

We overrule the fifth and sixth assignments of error which complain of improper argument by plaintiff's counsel. The remarks were: "The Continental Casualty Company has tendered into open court one-fourth of the policy of insurance sued on, less the sum of thirty dollars due on the premium, and the purpose of this tender is to

make the poor widow pay the costs of court." Also this: "The Continental Casualty Company never pays its policies without suit. The law books of the country are full of cases against the Continental Casualty Company." These utterances were objected to on each occasion and the objections sustained, and the bills show that the court thereupon instructed the jury not to consider same, and counsel stated to the jury that he withdrew them and asked them not to consider same. It is true, as stated by appellee, that neither of the bills states the objection that was made to said remarks, but from what is set forth in them the objection is fairly indicated and could have been no other than that the language was improper argument. We do not overrule the assignments on this ground. On examining the evidence, as we have had to do, it seems to us that it preponderates in favor of the verdict rendered, and we think it fairly appears that the jury were governed by the evidence and not by said remarks. McLane v. Paschal, 74 Texas, 27. Besides, we have here the feature that the judge admonished the jury to not consider the remarks and that counsel withdrew same, and we have held in similar situations that it might be presumed that the jury heeded the court's instruction. International & G. N. Ry. v. Aleman, 52 Texas Civ. App., 565. While this may not be the rule to apply in every case, we think the objectionable argument should not require the present judgment to be set aside. Affirmed.

Affirmed.

Writ of error refused.

GULF PIPE LINE COMPANY v. J. M. BRYMER.

Decided January 27, 1910.

1.—Negligence—Pipe Line—Escape of Oil—Charge.

In an action for injury to plaintiff's land and crops by oil negligently permitted by the proprietor of a pipe line to escape therefrom upon the land, it was not proper to instruct a verdict for defendant on the ground of lack of evidence of negligence, in the construction and maintaining the pipe line, where the pleading and proof also presented an issue as to defendant's negligence in failing to prevent the oil from coming onto plaintiff's land after its escape from the pipes.

2.—Negligence—Pleading—Res Ipsa Loquitur.

Where plaintiff pleads specifically the acts of negligence by defendant relied on, he must prove such negligence and can not rely on a general inference of negligence from the happening of the injury under the doctrine res ipsa loquitur.

3.—Same.

Where the inference of defendant's negligence from the happening of the accident can be referred as well to a negligent act or omission not pleaded as to the specific negligence alleged, the maxim res ipsa loquitur is not applicable.

4.—Damages—Injury to Crop and Soil.

The measure of damages for injury to grass and cornstalks on plaintiff's land was the value of the things destroyed; that for injury to the turf and soil the difference in value of the land before and after the injury, irrespec-

tive of the value of the grass, etc., destroyed. See charge on subject held to permit recovery of double damages.

Appeal from the District Court of Hopkins County. Tried below before Hon. R. L. Porter.

D. Edward Greer and *Templeton, Craddock, Crosby & Densmore,* for appellant.—Where a plaintiff's cause of action is grounded solely on alleged negligence, and the plaintiff in his opening proof adduces no evidence of negligence on the part of the defendant, as claimed in his petition, the court should grant a motion to instruct the jury to find for the defendant. Lindsay v. Murphy, 48 S. W., 532; Marchand v. Gulf, C. & S. F. Ry. Co., 20 Texas Civ. App., 1; Berry v. Osborn, 52 S. W., 624; Washington v. Missouri, K. & T. Ry. Co., 36 S. W., 779; Joske v. Irvine, 91 Texas, 574; Umscheid v. Scholz, 84 Texas, 269; Texas Loan Agency v. Fleming, 92 Texas, 464.

Where a plaintiff's cause of action is predicated solely on alleged negligence and the evidence fails to show any negligence as charged in the petition, the court should charge the jury, when requested so to do, peremptorily, to bring in a verdict for the defendant. Same authorities; Texas & Sabine Ry. Co. v. Meadows, 73 Texas, 32.

Where the evidence on any given issue made by the pleadings, is insufficient and utterly fails to sustain the issue, it is error for the court to refuse to take such issue away from the jury, when so requested by special charge. St. Louis S. W. Ry. Co. v. Groves, 44 Texas Civ. App., 63; Missouri, K. & T. Ry. Co. v. Plunkett, 103 S. W., 663; Missouri Pac. Ry. Co. v. Platzer, 73 Texas, 117; Shulz v. Tessman, 92 Texas, 491; El Paso & N. W. Ry. Co. v. McComas, 72 S. W., 629; Galveston, H. & S. A. Ry. Co. v. Sullivan, 42 S. W., 569; McCormick Machine Co. v. Mays, 33 S. W., 884; Western U. Tel. Co. v. Drake, 29 S. W., 920; Missouri Pac. Ry. Co. v. Peay, 20 S. W., 59; Parks v. Worthington, 39 Texas Civ. App., 421; Gulf, C. & S. F. Ry. Co. v. Archambault, 94 S. W., 1108.

Where a public service corporation having the right of eminent domain has acquired the right of way over lands in a lawful manner, and has constructed its pipe line with due care as to the selection of materials and construction of the line itself on the right of way, and has exercised all due and proper care in operating said pipe line for the conveyance of oil for the public, it is not liable if oil escapes from said pipe line, notwithstanding its exercise of due and proper care in the above respects, and injures lands contiguous thereto, and such a common carrier owes no duty to such landowner to follow up the oil so escaping without any negligence on its part, and to destroy the same, and a failure to do so is not negligence; especially if the burning of oil would destroy other property such as bridges across the stream. Missouri Pac. Ry. Co. v. Platzer, 73 Texas, 120; Galveston, H. & S. A. Ry. Co. v. Chittim, 31 Texas Civ. App., 40; Kinney v. Hannibal & St. L. Ry. Co., 70 Mo., 256; Missouri Pac. Ry. Co. v. Donaldson, 73 Texas, 128.

C. E. Sheppard, for appellee.—Where a plaintiff's cause of action

is based solely upon alleged negligence and he is not in possession of the means of proving such negligence, but the defendant is in possession of the means of disproving such negligence on its part and fails to do so, then the law presumes the existence of the negligence when the plaintiff shows that the injury happened and the damages resulted therefrom as alleged by him, and the facts proven by appellee in the opening of this case bring it within this rule. Ryan v. Missouri, K. & T. Ry. Co., 65 Texas, 13; International & G. N. Ry. Co. v. Timmerman, 61 Texas, 660; Galveston, H. & S. A. Ry. Co. v. Horne, 69 Texas, 643; Scott v. Texas & P. Ry. Co., 93 Texas, 625; Washington v. Missouri, K. & T. Ry. Co., 90 Texas, 314.

Where a pipe line belonging to a corporation breaks without fault on its part, and the oil that is being transported through such line begins to escape through such break, it then becomes the duty of such pipe line company to use ordinary care to prevent such escaping oil from spreading in such a manner as to damage other property, and a failure on its part to use such care constitutes actionable negligence. Missouri Pac. Ry. Co. v. Platzer, 73 Texas, 120.

The fact that the pipe did break was sufficient to allow the jury to determine as to whether it broke from negligence or whether the employes of appellant had used ordinary care. Missouri Pac. Ry. Co. v. Platzer, 73 Texas, 120; Scott v. Texas & P. Ry. Co., 93 Texas, 625; Gulf, C. & S. F. Ry. Co. v. Baugh, 43 S. W., 557.

WILLSON, CHIEF JUSTICE.—About November 15, 1907, appellee owned a tract of land situated on Mitchell Creek, in Hopkins County, and appellant owned and operated in carrying crude or unrefined oil from Watkins, Oklahoma, to Sour Lake, Texas, a pipe line crossing said creek at a point about three miles above appellee's land. On the day mentioned, and again on November 17, 1907, oil escaped from the pipe line and flowed into the creek and low places near same. On the day last mentioned, as the result of rains falling in its locality, the creek overflowed, washing oil which had escaped from the pipe line down to and over portions of appellee's land, whereby, appellee claimed, the soil thereof was injured and rendered less productive, and whereby, he also claimed, grasses, etc., thereupon, and the sod and turf thereof, were destroyed. In bringing his suit to recover damages he claimed to have suffered and to aggregate the sum of $978.50, appellee alleged it to be a fact known to appellant that such oil, if allowed to run or stand upon land like his would injure same and growths thereupon, and in his petition further alleged that, "although knowing of said properties and effects of said oil upon such soil and growths, the agents and servants of the defendant, in control of and operating and maintaining said pipe line, so negligently operated and maintained the same, and the same had been so negligently constructed by the defendant out of such inferior material and in such negligent and careless manner, at said point where it crossed said Mitchell Creek and said bottom lands adjacent to it, that the same was, by reason of said negligence in its construction, maintenance and operation by the agents and servants of defendant, caused to burst and come apart so as to allow and cause said oil to run out

into said creek and its bottom lands at said point where the same is crossed by said pipe line, on the south side of said creek, and to negligently cause said oil to so run for several hours thereafter in great quantities, sufficient to cause the same to collect and stand in the bed of said creek and the low places in the bottom thereof, where the defendant negligently permitted the same to so collect and stand; that very soon thereafter, and while the said oil was so standing in the bed of said creek, in the low places in the bottoms adjacent thereto and adjacent to plaintiff's said lands, there came a rain and overflow in the neighborhood, which caused said creek to overflow its banks and the water to run over the bottom adjacent thereto, and over said thirty-six acres of cultivated land and ten acres of pasture land above described, as the same was accustomed to do under like circumstances, all of which was well known to the defendant, its agents and servants, or could have been known by the use of ordinary care, and caused said oil to be spread over the surface of the ground and the vegetation thereon of said forty-six acres of plaintiff's land in the tract above described." In his said petition appellee further alleged that appellant "knew, or by the use of ordinary care could have known, that said creek would overflow and said oil be caused to spread upon said lands and crops, when it negligently caused or allowed the same to escape from its said pipe at the time and place and in the manner that it did, as alleged herein, and when it allowed said oil to stand in the bed of said creek after it so escaped thereto, and he says that by the use of ordinary care in the construction, maintenance and operation of said pipe line at said place, by the defendant, said oil would not have flowed from said pipe line, and would not have been allowed to stand in said creek and overflow plaintiff's said lands, and that the damages herein complained of would not have occurred." In a trial amendment to his said petition appellee further alleged as follows: "That in addition to the negligence of the defendant, as alleged in plaintiff's said amended original petition, said defendant was further negligent in the construction, maintenance and operation of its said pipe line at the time and place as complained of by plaintiff in said amended petition, in that in laying and constructing said pipe line at the point where it broke, as alleged by plaintiff, said defendant negligently coupled two joints of its pipe in an uneven and unlevel and unskillful manner, so that the same was weak at said point and would not stand the ordinary pressure of the oil as the same was conveyed through it at said point, and negligently maintained the same in said condition to the time that it bursted as alleged in said petition; that said defendant was also guilty of further negligence in forcing oil through said pipe line at said point at said time with too great a pressure, so great that said pipe would not stand the same at said point, but bursted under it, as alleged by him in said petition; and was further negligent in making its construction at said point in such a weak manner and out of such weak and inferior material that the same would not withstand the pressure of the oil as it was conveyed through the same at said point and at said time, and that by reason of said negligence as above alleged, together with that alleged in plaintiff's said amended petition,

the same was caused to burst as alleged therein, and to do the injury and damage at the time, place and in the manner and to the amount as set out in said petition." In its answer, after denying the allegations of the petition, appellant alleged that as a common carrier and public service corporation it was authorized by law to construct, maintain and operate its pipe line; that it had acquired and held the right of way occupied by it through Hopkins County in the manner provided by law; that it had exercised due care in selecting the material used in the construction of its pipe line, and in constructing and afterwards maintaining and operating the same; that its said pipe line was in fact in good order and condition, and then further alleged as follows: "That said pipe was necessarily and properly placed underground where it could not be inspected, and defendant kept constantly informed as to its condition, and if there was any defect in the pipe at the place where the alleged break occurred the same was latent, and under the surrounding conditions was not discoverable by defendant by the exercise of due and proper care on its part; that defendant had no reason to anticipate any such break occurring, and had taken all proper precautions to guard against such breaks and the consequences thereof; that if any such break occurred as that alleged, and plaintiff has been damaged in any of the particulars alleged, which defendant denies, the same was due to inevitable accident, and happened in the course of the proper conduct and operation of defendant's pipe line and business, and the damages resulting from and incident to such break occurring are not recoverable in such a suit as this under the allegations of plaintiff's petition."

On the measure of damages the court instructed the jury as follows: "7th. If you find for plaintiff the measure of damages will be as follows: The measure of damage, if any, for the destruction of grass and cornstalks upon said land is the reasonable cash market value of such grass and cornstalks at the time and place the same was so destroyed, if they were, and the measure of damages for the destruction or injury to the grass turf and soil on said premises, if there was such destruction or injury, is the difference, if any, between the cash market value of said lands upon which such grass turf and said soil were situated just before they were destroyed or injured and just after they were destroyed or injured, if they were destroyed or injured."

The trial resulted in a judgment in appellee's favor for the sum of $223.50, interest and costs.

After stating the case as above.—On the theory, it seems, that if plaintiff was entitled to recover at all it must have been because, and only because, appellant had been guilty of negligence in the construction and operation of its pipe line, on the ground that there was no evidence whatever that it had been so negligent, appellant asked the court to peremptorily instruct the jury to find in its favor. If it should be conceded that the maxim *res ipsa loquitur* had no application to the case, and that proof merely that the pipe broke, and that oil flowed therefrom and on to appellee's land and injured it, did not raise an issue as to negligence on its part in the construction and operation of the pipe line, the court properly refused to instruct the

jury as so requested, because it ignored an issue made by the pleadings and the evidence as to appellant's liability, notwithstanding it may not have been guilty of negligence in constructing and operating its pipe line, if it was guilty of negligence in that it failed to use ordinary care after the oil escaped to prevent an injury thereby to appellee's land and pasturage thereon. In Missouri Pac. Ry. Co. v. Platzer, 73 Texas, 117, it was held that, notwithstanding the absence of negligence on the part of a defendant in kindling a fire on his own premises, if it spread to adjoining premises and he should fail to use ordinary care to extinguish it, he would be liable for injury resulting from it to the owner of such premises. The ruling in that case has repeatedly since been followed by the courts of this State (Houston & T. C. Ry. Co. v. Anderson, 44 Texas Civ. App., 394, 98 S. W., 440; Galveston, H. & S. A. Ry. Co. v. Chittim, 31 Texas Civ. App., 40, 71 S. W., 296; Dillingham v. Whitaker, 25 S. W., 724; Rost v. Missouri Pac. Ry. Co., 12 S. W., 1133), and we think the principle furnishing the basis for it is applicable in a case like this one, and that the court did not err in refusing to so peremptorily instruct the jury.

Appellant contended that the evidence failed to show any negligence on its part (1) in the selection of material with which to construct its pipe line; (2) or in constructing its said pipe line at the point where it broke; (3) or in the operation of same at the time it was broken; (4) or in connection with the escape of the oil from its pipe line, and requested the court to instruct the jury not to consider questions as to its negligence in those particulars. If the maxim *res ipsa loquitur* should be applied to the case as made by the pleadings, the requested instructions we think were properly refused. But we are of the opinion that that maxim was not applicable, because in his pleadings appellee charged, as the negligence he relied upon, specific acts and omissions on the part of appellant. In Kennedy v. Metropolitan St. Ry. Co., 107 S. W., 17, it was held by the Kansas City Court of Appeals that, "where a plaintiff states a case of specific negligence, he abandons his right to the presumption arising from the rule of *res ipsa loquitur,* and voluntarily takes upon himself the burden of proving the specific negligence charged." A similar ruling was made by the same court in Tighe v. Atchison, T. & S. F. Ry. Co., 107 S. W., 1035, and by the Supreme Court of Missouri in Feary v. Metropolitan St. Ry. Co., 62 S. W., 458; McGrath v. St. Louis Transit Co., 94 S. W., 874, and Price v. Metropolitan St. Ry. Co., 119 S. W., 938. In the case last mentioned the court said that pleading specific acts of negligence "rises to the dignity of an admission of record that she (the plaintiff) knew the cause of the accident. Not only so—she points out specifically the negligent acts, and must prove them, and recover, if at all, upon the negligent acts pleaded." The same ruling seems to have been made by the Court of Civil Appeals for the Fourth District in Lone Star Brewing Co. v. Willie, 52 Texas Civ. App., 551, 114 S. W., 191, where Neill, J., said: "This is not a case where the dictrine of *res ipsa loquitur* applies; for the plaintiff, having specifically alleged the acts of defendant's negligence, can not make out a *prima facie* case without direct proof of actionable negligence, but must prove the acts of negligence which

he averred, and that such negligence was the proximate cause of his injuries." In its opinion on a motion for a rehearing, the court explained that it did not mean by the use of the words "direct proof" that negligence specifically alleged could not be shown by circumstantial evidence, but we do not understand them to have meant by such explanation that they receded from the opinion they had expressed, that the maxim did not apply where the negligence relied upon is specifically alleged. In his work on Negligence, Judge Thompson states the rule to be that the plaintiff "is not deprived of his right to rely upon the doctrine of *res ipsa loquitur* by reason of having averred the particular act of negligence complained of, where such act is the one which the legal inference of negligence tends to establish," citing as authority for the rule, as he states it to be, Gallagher v. Edison Illum. Co., 72 Mo. App., 576, a case to which we have not access; 6 Thompson on Negligence, sec. 7643, p. 627. In Louisville & S. I. Traction Co. v. Worrell, 86 N. E., 78, the Appellate Court of Indiana followed without comment the rule as stated by Judge Thompson. An examination of the case cited in the 72 Missouri Appeals might disclose that it is not in conflict with the later cases from that State, cited above. But if it is, it should be regarded as overruled by them. If the rule is as it is stated to be in the Kennedy and Price and other cases cited above, it is clear the doctrine in question has no application to the case before us. And we think it is not within the rule, even as it is stated by Judge Thompson to be. It was shown that pieces of iron or steel piping, threaded at their respective ends, were used in constructing the pipe line, and that it was constructed during very warm weather, by joining consecutively, by means of a threaded collar, the pieces of piping one to another. The piping so joined was then placed in a trench prepared for the purpose, varying in depth from two to four feet, according to the lay of the land, and covered with dirt. It was shown that the oil escaped during a spell of cold weather, and the testimony tended to show that it escaped because the threading holding together sections of the piping at the place where it escaped had been broken, permitting such sections to separate and pull apart from each other. Witnesses testified that the separation of the sections was due to the effect on the iron or steel of the cold weather; that the piping before same was connected in the construction of the line had become expanded by the then prevailing heat, and as the effect of the cold weather prevailing when the oil escaped the piping had so contracted as to shorten and cause the sections to pull apart at the place where the oil escaped. In specifying the negligence he relied upon as entitling him to recover the judgment he sought, appellee did not charge as negligence on the part of appellant that it constructed its pipe line without reference to the effect thereon of variations in the temperature of weather reasonably to be anticipated in the locality where it was situated. The "legal inference of negligence" from an application of the maxim in question, "tends to establish" negligence in the particular we have just discussed as strongly as it does in any of the particulars specified in appellee's pleadings. We have therefore a case where the legal inference of negligence arising from the happening of the accident and

consequent injury, "where the defendant owes to the plaintiff a duty to use care, and the thing causing the accident is shown to be under the management of the defendant or his servants, and the accident is such that in the ordinary course of things does not occur if those who have the management or control use proper care" (29 Cyc., 591), may as reasonably be referred to an act or omission of the defendant not pleaded as it can be to its acts or omissions pleaded. In other words, the "legal inference tended to establish" not only the "particular act of negligence complained of," but another act of negligence as well, on account of which, because he had not pleaded it, plaintiff was not entitled to recover. Under the rule as stated by Judge Thompson it may be, if a plaintiff's pleadings in a given case should specify as negligence every act or omission of the defendant from which an inference of negligence proximately causing the injury could be deduced, the maxim might be invoked to support the judgment. But when the plaintiff's pleadings fail to make such a specification, and the legal inference of negligence can be referred as well to an act not specified as to one specified, we think the maxim can not be invoked under the rule as he states it.

The seventh paragraph of the court's charge to the jury, copied in the statement made of the case, is attacked on the ground that it did not correctly state the measure of the damages recoverable by appellee, if the finding of the jury should be in his favor. There was evidence tending to show that grass and cornstalks on the land were rendered valueless as pasturage; that the turf of the grass was killed, and that the soil was rendered less productive, more difficult to cultivate, etc. The measure of damages for grass and cornstalks destroyed was the market value of same at the time and place when and where same were destroyed; and the measure of damages to the land by reason of injury to the turf, etc., was the difference in the value of the land immediately before and immediately after the oil injured it, not taking into consideration the value of the grass and cornstalks. Texas & P. Ry. Co. v. Prude, 39 Texas Civ. App., 144, 86 S. W., 1047; Galveston, H. & S. A. Ry. Co. v. Chittim, 31 Texas Civ. App., 40, 71 S. W., 297. The instruction was misleading, and therefore erroneous, we think, in that it might have been construed by the jury as authorizing a double recovery on account of the grass and cornstalks. They might have construed it as directing them to find as the damages to the land the difference between its value with the grass and cornstalks uninjured on it immediately before it was injured, and its value immediately thereafterward, when the grass and cornstalks had become valueless.

Such of the assignments in the brief as present questions likely to arise on another trial, and which have not in effect been disposed of by what has been said, are overruled.

The judgment is reversed and the cause is remanded for a new trial

Reversed and remanded.

E. PULLMAN ET AL. v. CITY OF HOUSTON ET AL.

Decided January 28, 1910.

1.—Streets—Dedication—Evidence—Maps and Deeds.

The existence and record for more than sixty years of maps of a city which during that time were generally recognized as correct maps of the city as it was originally laid out, and the fact that the successors in title of the original owner of the land on which the city is situated have during that time recognized and referred to said maps and the streets thereon shown in the sale and conveyance of lots and blocks in said city, are sufficient to sustain a conclusion that the streets shown on the map had been irrevocably dedicated to the public by the original owner of the land, although there was no direct evidence to that effect.

2.—Same—Acceptance by City not Necessary.

When, by reason of the sale of lots and blocks by reference to the map of a city, the right is vested in the purchasers to have the streets shown thereon, opened, an acceptance by the city authorities is not necessary to complete the dedication.

3.—Practice—Conflicting Testimony—Question for Jury.

The mere fact that the testimony of witnesses upon an issue is conflicting and appears to preponderate in favor of one side will not authorize the trial court to take the case from the jury.

4.—Homestead—Conveyance by Husband—Effect.

If the husband conveys the homestead by a deed in which the wife does not join, such deed conveys the title to the property as against all other persons except the wife and those claiming under her. Such deed is void only in so far as the homestead rights of the wife is concerned, and subsequent acquisition by her of another homestead would estop her from asserting any right in the one sold by the husband.

Appeal from the District Court of Harris County. Tried below before Hon. W. P. Hamblen.

A. C. Van Velzer, for appellant and *Fisher & Sears,* of counsel.—Where there is a conflict in testimony of facts material to plaintiff's case, or where different conclusions may be drawn from such testimony, or where defendant has given some testimony which tends to prove a defense, it is error for the court to direct a verdict. Rogers v. Broadnax, 24 Texas, 542; Supreme Council of A. L. of H. v. Anderson, 61 Texas, 300.

The court erred in failing to submit to the jury the question whether or not the property in controversy was a street or had ever been dedicated or accepted or used as a street. Newberger v. Heintze, 3 Texas Civ. App., 259; Dittman v. Weiss, 31 S. W., 67; Ellis v. Rosenberg, 29 S. W., 519; Fitzgerald v. Hart, 17 S. W., 369.

To constitute ground a public road, the owner's offer to dedicate must be formally accepted by the public authorities, if there is no implied acceptance from long use. Albert v. Gulf, C. & S. F. Ry. Co., 2 Texas Civ. App., 664; Missouri Pac. Ry. Co. v. Lee, 70 Texas, 496:; San Antonio v. Sullivan, 4 Texas Civ. App., 451; Jefferson Co. v. Plummer, 53 S. W., 711.

Unless an offer made by the owner of the soil to dedicate property

for street uses is accepted by the public authorities within a reasonable time after the offer is made, the dedication is not completed. Monat County v. Denver, 21 Colo., 1; Demartini v. San Francisco., 107 Cal., 402.

Where the defendant's pleadings and evidence raise an issue of title by limitation of ten years, it is error for the court to direct a verdict for another party. Potter v. Wheat, 53 Texas, 401; Fitzgerald v. Hart, 23 S. W., 933.

Baker, Botts, Parker & Garwood, Wm H. Wilson and *C. R. Wharton,* for appellees.

PLEASANTS, CHIEF JUSTICE.—This appeal is from a judgment of the District Court of Harris County rendered upon the trial of two suits against appellants, E. Pullman and wife, one brought by the appellee City of Houston, and the other by appellee R. P. Smith, which suits were consolidated and tried as one. The appellee Houston & Texas Central Railway Company intervened and became a party plaintiff. The object of the suit was to recover from appellants, for the use and benefit of the public, certain real property in the city of Houston in possession of the defendants, and claimed by plaintiffs and intervener to be a part of two of the public streets of said city.

The defendants, among other defenses, pleaded limitation of ten years.

The trial judge, after hearing the evidence, instructed the jury to find for plaintiffs and interveners; and upon a return of such verdict judgment was rendered in accordance therewith.

The evidence shows that the property in controversy is a part of Baker and Cedar Streets in the city of Houston, as said streets appear and are marked and designated upon all of the public maps of said city. Some of these maps introduced in evidence appear to be very old, and the undisputed evidence shows that they have been generally recognized for sixty years or more as correct maps of the city of Houston as it was originally laid out. One of them, known as the Girard map, has been of record for more than sixty years. While it is not shown by any direct evidence that said map was recorded by the original owners of the land upon which the city is located, or by their authority, their successors in title have, in numerous deeds, some of which appear in the chain of title of the intervener and the plaintiff Smith, recognized and referred to said map, and sold lots and blocks in said city with reference to the streets shown thereon, including Baker and Cedar Streets. These facts are amply sufficient to sustain the conclusion that, prior to any claim thereto on the part of defendants or those under whom they claim, these streets had been irrevocably dedicated to the public by the then owners of the land on which they were laid out. (Oswald v. Grenet, 22 Texas, 94; City of Corsicana v. Zorn, 97 Texas, 317; Wolf v. Brass, 72 Texas, 133.)

No acceptance by the city was necessary to complete the dedication, and the fact that the portions of the streets now claimed by the defendants abut the bayou, where there is no bridge or other means of

crossing, and therefore that portion of the streets has never been used as a thoroughfare, does not affect the irrevocable character of the dedication. The case of City of Corsicana v. Zorn, *supra,* conclusively settles this question.

Under their plea of limitation defendants introduced witnesses who testified to facts which, if found by the jury to be true, are sufficient to sustain the conclusion that one Lewis Green occupied the premises in controversy for more than ten years prior to 1887, claiming the property as his own. There was also evidence which would sustain a finding that Green, in 1888 or 1889, conveyed the premises to defendant Pullman by a deed which has been lost. The testimony of defendants' witnesses upon these issues is contradictory, and appears to be against the great preponderance of the evidence, but the trial judge was not authorized on this account to take the case from the jury. (Lee v. International & G. N. Ry. Co., 89 Texas, 583; Choate v. San Antonio & A. P. Ry. Co., 90 Texas, 88.)

The fact that the property was the homestead of Green and his wife, and that the wife did not join in the alleged deed to defendant, would not make the deed void. If the husband conveys the homestead by a deed in which the wife does not join, such deed is only void in so far as the homestead rights of the wife are concerned, and the acquisition of another homestead would estop her from asserting any right in the one sold by the husband. (Irion v. Mills, 41 Texas, 310; Wright v. Hays, 34 Texas, 253; Allison v. Shilling, 27 Texas, 450; Cross v. Everts, 28 Texas, 524; Marler v. Handy, 88 Texas, 421.) It follows from this that while the wife, who had not acquired another homestead, or those claiming under her, would be entitled to have such deed set aside, and might recover the property so sold, as against all other persons the husband's deed conveys the title.

We have not deemed it necessary or profitable to discuss in this opinion the several assignments of error contained in appellants' brief in detail. What we have said disposes of all the material questions presented.

The failure of the trial court to submit the issue of limitation requires a reversal of the judgment. If any other error is shown by the record it is not material, and not such as is likely to occur upon another trial.

For the error above indicated the judgment of the court below is reversed and the cause remanded, and it has been so ordered.

Reversed and remanded.

E. A. PERRY ET AL. v. STANDARD LIFE & ACCIDENT INSURANCE COMPANY OF DETROIT.

Decided January 29, 1910.

Accident Insurance—Contract—Construction.

A ticket or policy of accident insurance contained the following stipulations: "This ticket does not insure any person under eighteen or over sixty-five years old, nor any person employed on any public conveyance, etc." Held, the legal representatives of a person over sixty-five years old at the time he

bought the ticket of insurance and at the time he was fatally injured, could not recover on said contract. By the terms of the contract a person over sixty-five years of age was not insured thereby.

Appeal from the District Court of Tarrant County. Tried below before Hon. Mike E. Smith.

Bell & Milam, for appellants.

W. J. J. Smith, for appellee.

SPEER, ASSOCIATE JUSTICE.—This is an action by appellants as executors of the will of F. M. Phelps, deceased, to recover upon an accident policy issued by the appellee in favor of said Phelps. There was a trial before the court resulting in a judgment in favor of the defendant in the action, and the plaintiffs have appealed, presenting the sole question of the interpretation of the following provision contained in the policy sued on, viz.: "This ticket does not insure any person under eighteen or over sixty-five years old, nor any woman except against death only, nor any person employed on any public conveyance," etc. The deceased Phelps, at the time he procured the ticket of insurance, was a man over sixty-five years old, and the case is presented to us as though the trial court had denied the recovery because of this fact, and we will so treat the decision ourselves.

The contention of appellants, in the language of their counsel, is "that the words 'except against death only' apply to a man over sixty-five years old as much as to a woman. If it had been the intention of the insurance company to limit the exception to women only, the ticket would have read, 'this ticket does not insure any woman except against death only, nor any person under eighteen or over sixty-five years old, nor any person employed on any public conveyance, nor any person bereft of reason,'" etc. But to our minds the trial court correctly held that the exception of liability against death did not apply to a man more than sixty-five years old. Undoubtedly, the language given as an instance by appellants would have had the meaning suggested, but so we think the language of the contract, without the transposition, means identically the same thing. We think a person under eighteen or over sixty-five years old, and each class of persons named in subsequent clauses introduced by the word "nor," contemplates a separate and distinct class within itself, against which the company did not undertake to insure. The phrase "except against death only," whether considered from the viewpoint of context or punctuation, evidently relates only to the class in connection with which it is used—that is, to women. We do not consider it a case of ambiguity calling for the application of the rule invoked by appellants, that, where a contract of insurance is capable of two interpretations, that one most favorable to the insured will be adopted.

Neither will appellants' suggestion that this interpretation renders the exception repugnant to the undertaking of the policy avail them, since the effect is merely to hold that the deceased never came within the terms of the policy, there being no contention that the company

in any manner waived the condition that the contract should not be operative in favor of one outside the prescribed age limit. These conclusions result in an affirmance of the judgment.

Affirmed.

Writ of error refused.

J. PICKERELL v. JOE IRBY ET AL.

Decided January 29, 1910.

Taxing Costs—Statute Construed.

Under the provisions of article 1438, Rev. Stats., the trial court may for good cause, to be stated on the record, adjudge the costs of the case against the successful party. What constitutes good cause is left largely to the discretion of the trial court. The action of the court in so adjudging the costs upheld in a case where the plaintiff's own carelessness and dereliction of duty necessitated the issuance and perpetuation of a writ of injunction against opening a public road.

Appeal from the District Court of Haskell County. Tried below before Hon. C. C. Higgins.

W. C. Jackson, for appellant.

H. G. McConnell and *Gordon B. McGuire,* for appellee.

SPEER, ASSOCIATE JUSTICE.—This is an injunction suit brought by appellant against the members of the Commissioners' Court of Haskell County and the road overseer, to enjoin the opening up of a public road along the south line of his land. The temporary writ was granted, and on final trial was made perpetual, but the court before whom the case was tried at the same time rendered judgment against the plaintiff for the costs of the case. No reasons were stated by the court for awarding the costs as he did in the original judgment, but, upon overruling the plaintiff's motion to retax costs, he did state such reasons, and they are incorporated in his judgment, and the sufficiency of such grounds is the question which we are to determine on this appeal.

The order overruling appellant's motion to retax costs is as follows: "On this day came on to be heard the motion of the plaintiff, J. Pickerell, to retax the costs in the above-entitled and numbered cause and tax them against the defendants, and the parties appeared by their attorneys and announced ready for trial upon said motion, and the court, after having heard said motion and the argument of counsel thereon, is of the opinion, and finds the facts to be, that the plaintiff in this suit has sued out this writ for the purpose and with the intent to delay the promotion of a public enterprise, to wit, the establishment of a public road on which he may and must travel to get away from his own house, and a road upon which he had been appointed as a juryman on the jury of view, and acted until the report was made and signed by the other members, but the plaintiff would not sign for the sole reason that said jury allowed him only $22.50 instead of $125, as claimed by him.

"The court further finds that the injunction was perpetuated on the grounds that the road was not properly located so as to be identified on the ground with that degree of certainty prescribed by law, and that the plaintiff was as much to blame for the failure of the report to correctly locate the land upon which the road should run as the others, in that he made his claim for damages to a section of land not touched by the road, and was present when the road was run out, and participated therein, and that by reason of his claiming damages on the wrong piece of land the other jurors were misled as to the section from which the road took a narrow strip, and therefore the court finds that this is good cause for assessing the costs against the plaintiff.

"It is therefore ordered by the court that the motion of the plaintiff be and the same is hereby in all things overruled."

The general rule provided by statute (Sayles' Texas Civil Statutes, article 1425) is that the successful party to a suit shall recover of his adversary all the costs expended or incurred therein, except where it is or may be otherwise provided by law. But this is subject to the qualification prescribed in article 1438, that the court may, for good cause, to be stated on the record, adjudge the costs otherwise. What this good cause is or may be in a given case necessarily is left largely to the discretion of the trial court, and the appellate court would not be at liberty to set aside its judgment unless the same was a clear abuse of such discretion. See Texas & Pacific Railway Company v. Wheeler, 99 Texas, 428; Missouri, Kansas & Texas Railway Co. of Texas v. Milliron, 53 Texas Civ. App., 325 [115 S. W., 655]; Morrow v. Terrell, 21 Texas Civ. App., 28 [50 S. W., 734]. We can not hold as matter of law that the trial court abused his discretion in holding that the appellant should be taxed with the costs where his own carelessness and dereliction of duty necessitated the perpetuation of his writ of injunction. The judgment is therefore affirmed.

Affirmed.

C. L. SANDERS ET AL. v. EASTLAND INDEPENDENT SCHOOL DISTRICT ET AL.

Decided January 29, 1910.

1.—Appeal—Certiorari—Practice.

The rule of practice is well settled that it is too late after a case is submitted and decided by the appellate court to suggest a diminution of the record, thereby involving the court in a reconsideration of the entire case.

2.—Same—Case Stated.

An appealed case was dismissed by the appellate court for the want of prosecution; upon motion of appellant the dismissal was set aside, briefs were filed, the case considered and the judgment affirmed; the court affirmed the judgment because the assignments of error raised questions that could not be considered in the absence of a statement of facts, and there was no statement of facts in the record: in the motion for rehearing as to the last judgment, the only excuse offered for failure to incorporate the statement of facts in the record was inadvertence of counsel; the motion was not sworn to. Held, the motion for rehearing should be overruled.

3.—Same—Case Distinguished.

Western Union Tel. Co. v. O'Keefe, 87 Texas, 423, distinguished.

Appeal from the District Court of Eastland County. Tried below before Hon. Thomas L. Blanton.

D. G. Hunt and *J. J. Butts,* for appellants.

Earl Conner and *Scott & Brelsford,* for appellees.

SPEER, ASSOCIATE JUSTICE.—On December 18th last we dismissed the appeal in this case for want of prosecution, there being no briefs on file for appellants. On January 1st, upon appellants' motion, we granted leave to file briefs, and afterwards, upon a consideration of such briefs, the judgment was affirmed. In affirming the judgment, which was done orally, we stated: "There is no statement of facts in the record which we can consider. The only assignments of error presented raise questions that can not be considered in the absence of a statement of facts." We are now asked to grant a rehearing as to this last judgment and to permit appellants to file the original statement of facts. No excuse whatever is given for the failure to file such statement of facts in proper time, further than to say the filing of the unsigned and unfiled copy, instead of the original statement, was due to the inadvertence of counsel, who had in his possession both the original and the copy while briefing the case. The motion for rehearing is not supported by affidavit.

The rule of practice appears to be well settled that it is too late, after a case is submitted and decided by the appellate court, to suggest a diminution of the record, thereby involving the court in a reconsideration of the entire case. Ross v. McGowen, 58 Texas, 603; Missouri Pacific Railway Co. v. Scott, 78 Texas, 360; McMickle v. Texarkana National Bank, 4 Texas Civ. App., 210 [23 S. W., 428]. The rule was most emphatically announced in Ross v. McGowen, *supra,* and the profession was put upon notice that the same would be hereafter adhered to in the following language: "To prevent any future application of this character after the record is in our hands for decision, we have thought it proper to put our decision on this motion in writing, and the rule laid down in it will be hereafter rigidly enforced."

The case of Western Union Telegraph Co. v. O'Keefe, 87 Texas, 423, is an apparent, and possibly real, exception to the rule thus emphatically announced. That case originated in the District Court, and on appeal to the Court of Civil Appeals the appeal was dismissed because no notice of appeal appeared in the record. The appellant duly filed his motion to reinstate the appeal upon the ground that the notice was in fact given, which motion was supported by the affidavit of the attorney who tried the case, and by a certificate of the clerk of the trial court to a copy of the entry on the judge's docket by which the fact was made to appear. The action of the Court of Civil Appeals in dismissing the appeal and refusing to reinstate the cause was made the grounds of complaint in the Supreme Court, and

while the Supreme Court there held that the motion to reinstate should have been granted, still we think that case is distinguishable from the present case and the authorities above cited, in this, that a dismissal of an appeal for want of jurisdiction does not involve a consideration of the merits of the case. It is a refusal to assume jurisdiction. The case is also distinguishable from the present case in the fact that the motion for rehearing was supported by affidavit.

Counsel for appellees cite us to the case of Shaw v. Schuch, 58 Texas Civ. App., 255, as holding "that a motion for *certiorari* for the clerk of the District Court to send up the original statement of facts, filed after an affirmance of the judgment by the appellate court on account of an absence of an original statement of facts, would not be granted where it was alleged to be the fault of the district clerk in failing in the first instance to send up with the record the original statement of facts." We have not seen a copy of the opinion in this case, but independently of this holding, the rule announced in Ross v. McGowen, *supra,* commends itself to us, and appellants' motion is accordingly overruled.

Motion overruled.

I. BAUM v. W. M. MCAFEE ET AL.

Decided January 29, 1910.

1.—Appeal—Transcript—Unnecessary Papers.

Abandoned pleadings as such form no part of the pleadings necessary or proper to be incorporated in the transcript on appeal, and the appellant may be charged with the cost of incorporating them. And so of improper bills of exception and cross assignments of error.

2.—Bill of Exception by Bystanders—Statute.

Under the provisions of articles 1360, 1366, 1367, 1368 and 1369, Rev. Stats., only the party excepting to the ruling of the court and dissatisfied with the bill of exception which the trial judge is willing to give, may resort to a bill of exceptions by bystanders. It was not intended that the party in whose favor the ruling was made should prove up a bill of exception reflecting his version of what occurred and the court's ruling thereon. Nor does the fact that the judge failed or refused to submit to the adverse party the bill prepared by the party taking it, authorize such procedure.

3.—Appeal—Transcript—Cross Assignments.

Neither the statute nor the rules contemplate that cross assignments of error should be incorporated in the transcript on appeal.

4.—Land Agent—Express Contract—Pleading.

Pleading and evidence considered, and held to be based upon and to show an express contract to pay a certain commission for the sale of land.

5.—Joint Obligation—Several Liability.

Where two or more men make a joint promise, each is liable to the promisee for the whole debt or liability. This is true in a joint obligation as well as in a joint and several obligation.

6.—Same—Cases Distinguished.

Speake v. White, 14 Texas, 365, and Willis v. Morrison, 44 Texas, 27, distinguished.

7.—Appeal—Assignment of Error.

An assignment of error based upon two different statements made by counsel in his argument to the jury, and involving the decision of two separate and distinct questions, is not in accordance with the rules regulating the briefing of cases on appeal and is therefore not entitled to consideration.

Appeal from the County Court of Navarro County. Tried below before Hon. C. L. Jester.

R. S. Neblett and *H. L. Stone,* for appellant.

Richard Mays, for appellee.

TALBOT, ASSOCIATE JUSTICE.—Appellee W. M. McAfee instituted this suit against the appellant, I. Baum, and the appellee J. E. Whiteselle, for compensation for services rendered in selling a tract of land for the said Baum and Whiteselle, which was owned by them jointly, consisting of 3,806 acres. The land was sold for $19,030, and McAfee claimed a commission of five percent for selling, amounting to $951.50, for which he sued. He filed three petitions in the case, styled, respectively, "Plaintiff's original petition," "Plaintiff's amended petition," and "Plaintiff's first amended original petition." The case went to trial on the last named petition, which alleges that plaintiff was a real estate agent, and that, acting under a contract made between him and the defendants, he sold for defendants the 3,806 acres of land for the sum stated; that under the terms of his contract with defendants he was entitled to a one-third interest in the profits of said sale, which aggregated $3,806, he having bought the land for them at $4 per acre and sold it for $5 per acre. That, notwithstanding said contract, defendants refused to carry it out, and declined to pay plaintiff said one-third of said profits; that it was finally agreed between plaintiff and defendant Baum, who acted in behalf of himself and of his codefendant Whiteselle, that plaintiff was to have said sum of $951.50, which was to be immediately paid, but that defendants have failed and refused to pay the same. The petition concluded with a prayer for the said sum of $951.50, with interest thereon from January 1, 1907, at the rate of six percent per annum, for costs of suit and general and special relief.

For answer defendants jointly plead, first, that plaintiff agreed to handle the double transaction—buying and selling—for ten cents an acre, and that they had paid him in full; second, if their construction of the contract between them and plaintiff as to his compensation was erroneous, and if he was entitled to ten cents an acre for buying and ten cents an acre for selling, then they tendered same into court, as they had tendered it to plaintiff before the bringing of the suit in order to avoid any controversy, as they recognized the fact that plaintiff's expression that "he would handle the transaction for ten cents an acre" could be construed and understood to mean ten cents an acre for buying and ten cents an acre for selling, and this additional ten cents, which they had tendered him before the suit was brought, and then tendered into court, was the utmost that could possibly be due

under the contract. Defendants denied absolutely the existence at any time of a contract by which they were to pay plaintiff one-third of the profits on the sale of the land. They likewise denied any subsequent agreement, in lieu of such a contract, to pay plaintiff five percent commission. The trial resulted in a verdict and judgment in favor of plaintiff against defendant Baum for the full amount sued for, and in defendant Whiteselle's favor that the plaintiff recover nothing as to him. Baum filed a motion for new trial, which, being overruled, he excepted and perfected an appeal to this court.

Prior to the submission of the case on its merits, appellant filed an application addressed to this court, praying in the alternative for the issuance of a writ of mandamus requiring the clerk of the County Court of Navarro County to prepare and deliver to appellant a transcript, omitting therefrom certain papers which he averred were not necessary to a proper revision of the questions arising on the appeal, or that said papers be stricken from the transcript and appellee charged with the costs of including them therein. The mandamus, for reasons stated in a written opinion delivered by Mr. Chief Justice Rainey, which need not be repeated here, was refused, and a decision of the question of striking out the papers at appellee's cost was reserved until a determination of the case on its merits. The papers sought to be stricken from the record are appellee's original petition, his amended petition, the original answer of appellant Baum and Whiteselle, appellee's bills of exception ten and eleven, the affidavits of jurors and Richard Mays in support of the said bills, and the appellee's cross-assignments of error. We are of opinion the pleadings and bills of exception referred to can not be considered in reviewing the ruling of the lower court, and that appellee should be taxed with costs of including them in the transcript. By amendments filed, said pleadings were abandoned, and form no part of the pleadings necessary or proper to be incorporated in the transcript. Of course, if either or all of said documents had been offered and admitted in evidence as tending to establish some issue of fact, it would have been proper to include them in the statement of facts; but it does not appear that either of them was so offered and admitted. On the contrary, they are found in the record simply as pleadings which had been abandoned, as stated, and their presence in the transcript can serve no purpose whatever in the disposition of the appeal.

In reference to the bills of exception and affidavits mentioned, it appears that they relate to a proceeding or matter which occurred in the trial, excepted to by appellant and covered by his bills of exception numbers ten and eleven, which were by the court approved and made a part of the record. The bills of appellee, proved up by affidavits, seem to have been prepared and the affidavits secured in support thereof on the theory that the statutes of this State relating to the taking and preparation of bills of exception are broad enough to authorize such course. Article 1360 of the Revised Statutes provides that, "whenever in the progress of a cause either party is dissatisfied with any ruling, opinion or other action of the court, he may except thereto at the time the same is made or announced, and at his request time shall be given to embody such exception in a written bill."

It then becomes the duty of the party taking the bill to present it to the judge for his allowance and signature, who shall in turn submit it to the adverse party or his counsel, if in attendance upon the court, and, if found correct, it shall be signed by the judge and filed with the clerk. (Article 1366.) Should the judge, upon presentation of the bill, find the same incorrect, he shall suggest to the party or his counsel, who drew it, such corrections as he may deem necessary therein, and if they are agreed to, he shall make such corrections and sign and file it (article 1367); but if the party does not agree to such corrections, the judge shall return the bill with his refusal endorsed thereon, and shall make out and sign and file with the clerk such a bill of exceptions as will in his opinion present the ruling of the court as it actually occurred. (Article 1368.) Article 1369 provides: "Should the party be dissatisfied with the bill of exceptions filed by the judge, as provided in the preceding article (1367), he may, upon procuring the signature of three respectable bystanders, citizens of this State, attesting the correctness of the bill of exceptions as presented by him, have the same filed as part of the record of the cause," etc.

It will be observed that the last quoted article of the statute only makes provision for the proving up of a bill of exception at the instance of the party excepting to the ruling of the court, by bystanders. It does not either expressly or by implication authorize, in our opinion, the party not complaining at the court's ruling excepted to by the other party to the suit, to prove up a bill of exception reflecting his version of what occurred and the court's ruling thereon. Article 1369 provides that where the party excepting to the court's action is dissatisfied with the bill filed by the judge, and he avails himself of the benefits of that statute, the truth of the matter as set out by him in his bill and in the supporting affidavits may be controverted by similar affidavits secured by the adverse party, but it does not authorize such party, as it does the party complaining of the ruling, to impeach the bill prepared or approved by the judge and ordered filed, or to impose upon the appellate court by the procedure therein provided the duty of determining which bill is correct. Nor does the fact that the judge failed or refused to submit the bill prepared by the party taking it to the adverse party, authorize such procedure. Without statutory authority for so doing, the bills of exception prepared by appellee and copied in the record at his instance can not therefore be considered.

In regard to the cross-assignments of error filed by appellee, it may be said that neither the statute nor the rules contemplate that such assignments shall be incorporated in the transcript. Rule 101, relating to the filing of assignments of error, provides that the appellee may file cross-assignments with the clerk of the trial court when he files his brief, which may be incorporated in his brief and need not be copied in the transcript. It was the evident purpose of this rule to place the burden of bringing or presenting such assignments to the appellate court on the appellee, and prevent the encumbering of the record with them at the probable expense of the appellant. The cost of incorporating said papers in the transcript will therefore be taxed against the appellee.

Upon the merits of the case appellant assigns that the court erred (1) in not charging the jury to return a verdict for defendants, because plaintiff based his suit on an express contract for pay for his services, and the evidence showed he had only an implied contract therefor; (2) in submitting to the jury whether or not there was an express contract made between defendant I. Baum and the plaintiff for five percent commissions upon the price for which the land was sold, because there was no evidence on which to base such charge; (3) in submitting to the jury the question as to whether or not the defendant Baum, acting for himself only, agreed to pay plaintiff five percent commission for making sale of the land, because there was neither pleading nor evidence upon which to base such charge; (4) the verdict of the jury is contrary to the evidence in that there is no evidence showing that there was a contract by which defendants Whiteselle and Baum agreed to pay plaintiff five percent commission on the sale of the land; that there is no evidence which shows there was an agreement between plaintiff and defendants or between plaintiff and defendant Baum, by which Baum agreed to pay, for himself only, five percent commission upon the sale of the land. We overrule each of these assignments. The express contract declared on by appellee, and upon which he seeks to recover, was that appellant, acting for himself and Whiteselle, agreed to pay him five percent of the amount for which the land was sold, and the evidence, although conflicting, was sufficient to require the submission of the issue to the jury. Appellee did not seek a recovery for one-third of the profits arising from the purchase and sale of the land for appellant and Whiteselle, nor did he sue upon the implied promise to pay what his services were reasonably worth, but he sued for the five percent commission which he says was agreed to be paid him. He testified that the allegation in his petition to the effect that he had a contract with Baum and Whiteselle for a third of the profits on the sale of the land is not true; that Whiteselle in the presence of Baum told him to go ahead and make the sale, and that they would treat him right about it, and that afterwards Baum told him that Whiteselle had authorized him, Baum, to settle the matter, and, acting for himself and Whiteselle, agreed to pay the five percent commission. In this connection he stated: "Baum never did tell me that he (Baum) would give me five percent;" but we are of the opinion that the legal effect of appellee's promise and agreement made with Baum is to render Baum, if not Whiteselle, liable for the whole amount of the five percent commission, hence the court's charge in the particulars complained of is not erroneous; neither is the verdict of the jury unsupported by the evidence in either respect charged by the assignments.

Where two or more make a joint promise, each is liable to the promisee for the whole debt or liability. This is true in a joint obligation as well as in a joint and several obligation. In either case, "each obligor who is bound at all is legally liable *in solido* for the whole undertaking." (Allin v. Shadburne's Executor, 25 Am. Dec. (Ky.), 121, (47 Maine, 370); 74 Am. Dec., 491.) In the last cited case it is said: "Where several persons are jointly indebted, and one of them pays his specific share of the debt, and it is received and re-

ceipted for by the creditor as such, such payment will not exonerate the party paying from his liability for the residue of the debt." We do not think that either the case of Speake v. White, 14 Texas, 365, or Willis v. Morrison, 44 Texas, 27, is authority for the contention of appellant to the effect that if Whiteselle did not authorize Baum to make the agreement to pay appellee the five percent commission sued for, and was not therefore bound thereby, then Baum was not liable therefor. In Willis v. Morrison, *supra,* the suit was instituted by P. J. Willis & Bro. against John H. Morrison and H. C. Hunt, as merchant partners, doing business under the firm name of John H. Morrison & Co., on a draft drawn on Double & Wooters in favor of P. J. Willis & Bro. and signed, "John H. Morrison & Co., per T. C. Hooker." This instrument was partly paid, and to recover the balance due thereon the suit was brought. It was alleged that Morrison and Hunt were partners; that Hooker was their agent, and judgment asked against them. Morrison plead the general issue, and Hunt *non est factum,* and that he was not, at the time said draft was executed, a partner in said firm. The court, at the close of his charge relating to the law arising upon the issues presented, instructed the jury as follows: "If you can not find against defendant Hunt, neither can you find against defendant Morrison." In holding this to be an incorrect charge, Mr. Chief Justice Roberts said: "The action was founded on the draft, and not on the account for the settlement of which it was given, and the petition claimed a judgment on it against both defendants as partners, and prayed for general relief. The facts, as presented in the record, showed that both defendants were liable for the debt for which the draft was given, and that it was given by Hooker by the authority and direction of Morrison in the settlement of an account due from the firm of Morrison & Co. to the plaintiffs, though the account was not set out and declared on as constituting the cause of action, either in whole or in part, in the petition. The effect of the charge referred to was that, if Hunt maintained his defense of *non est factum,* and was not liable to be sued on the draft, it constituted no cause of action in this suit against Morrison, and that they should not render a verdict against him in this case." Then followed a review of the case of Speake v. White (14 Texas, 365), which was cited in support of the contention that the charge in the Willis-Morrison case was correct, and attention called to the fact that the only question of law discussed in the opinion in the Speake-White case was, whether one partner has the power to bind the firm by his acknowledgment of an antecedent indebtedness after the dissolution of the partnership, and that a judgment in favor of both defendants in that case was affirmed without noticing a similar charge to the one given in the Morrison case. In further discussion of the Speake-White case Judge Roberts says: "The acknowledgment in that case, in and of itself, was not the cause of action declared on, but it was set out in connection with the account as evidence of its correctness, the suit being in the nature of an action on an account stated. The acknowledgment was not, therefore, a contract, like a note or draft, given to settle a previous account which, when given, becomes a new contract on which an action may be brought without any dependence

upon the previous account. Under this view of that case the court might well have held that the acknowledgment, being used as proof and not as a contract, was not sufficient to establish the correctness of the account against the firm, and if not against the firm, it did not establish it as against White as one of the firm. They might have held very differently, however, if White, instead of acknowledging the correctness of the account, had given a note to which he subscribed the firm name, after the dissolution of the partnership, in settlement of said account. In that case the suit could be founded on the note which, if negotiable, would import a consideration, and if not negotiable, one could be averred for it, as it was done in this case. The question in such a case would be, Can a suit be maintained against the one who makes a note by signing his own name and that of another without any authority from such other person? There is no question, it is presumed, that such a suit can be maintained singly against the one signing the note upon proper averments and proof of the non-liability of the other."

We are unable to distinguish, in principle, the case at bar from the case of Willis v. Morrison, and regard it as authority in support of the judgment of the lower court, rather than an adjudication against it. Here, as in that case, the suit is founded on the new contract made by appellant Baum to pay the five percent commission, and not on the original and implied contract to pay what appellee's services in making the sale of the land were reasonably worth. Both contracts were verbal, and at least of equal dignity, the express contract to pay the commission taking the place of the implied contract, and why the principle announced in the Willis-Morrison case is not applicable we are unable to perceive. The evidence shows, as in the Willis-Morrison case, that both Baum and Whiteselle were liable under the original contract to appellee for the payment of whatever amount his services were reasonably worth, and that the contract sued on was made by Baum in substitution of the said original contract, and we see no good reason why the suit can not be maintained against Baum, although such new contract was not in writing, and even though it was made without authority from Whiteselle. In the case of Willis v. Morrison, above referred to, it is said, in effect, that "the rigid system of the common law as to forms of action, which required the plaintiff to be nonsuited if he sued two persons on a joint contract and one of them showed himself not to be liable on the contract, is contrary to the whole current of our practice and decisions from the earliest times of our judicial history."

The eighth assignment is to the effect that the court erred in permitting the attorney for plaintiff in his closing argument to make a statement and argument to the jury, unwarranted by the pleading and evidence, which was calculated to prejudice and mislead the jury to the injury of defendants. This assignment is not accompanied by any separate proposition, but is submitted as a proposition itself, and is, we think, under the rules, too general. Besides, looking to the statement made in support of the assignment, we find that it is based upon two distinct statements made to the jury in argument, and involves the decision of two separate and distinct questions. This

is not in accordance with the rules regulating the briefing of cases in this court, and the assignment is not, therefore, entitled to consideration. If, however, the matters were properly presented in the brief, neither of them would require a reversal of the case.

The ninth and eighteenth assignments are grouped, and relate to the admission of certain testimony. Neither of the assignments, nor the proposition or statement made under them, set out, except in a very general way, the testimony objected to, and it does not appear that bills of exception were reserved to the court's ruling, or, if so, where they may be found in the record. In this condition of the brief the assignments will not be considered.

The questions presented in assignments ten, eleven, twelve and thirteen have been decided against appellant in what has been said in a former part of this opinion.

The fourteenth and fifteenth assignments are grouped. They complain of separate and distinct matters in no way related, so far as we are able to tell from the brief; they are not supported by a statement of the material facts, and are not entitled to be considered by this court.

The other assignments have either been disposed of by what has already been said or disclose no reversible error.

We conclude the judgment of the court below should be affirmed, and it is so ordered.

Affirmed.

FEBRUARY, 1910.

WELLS-FARGO & COMPANY EXPRESS v. L. SOBEL.

Decided February 2, 1910.

1.—Master and Servant—Assault by Servant—Liability of Master.

When one acts through an agent he trusts the agent as to the manner of performance, and it must be assumed that he is satisfied the agent would act as he, the principal, would act under the circumstances. If this trust or confidence be misplaced, and if the agent mingles his personal resentment with the performance of his duties as agent, and commits an assault upon a party having business with him in his capacity as agent, the master is responsible. It would be otherwise if the assault was committed in resentment of offensive words or conduct at a time when the agent was not engaged in the conduct of his principal's business.

2.—Same.

In a suit for damages for an assault and personal injuries inflicted by an employee of an express company, evidence considered and held to sustain a finding that the assault was committed while the employee was engaged in the performance and within the scope of his duties to the company, and that the company was responsible for the injuries.

Appeal from the District Court of Jefferson County. Tried below before Hon. L. B. Hightower, Jr.

Crook, Lord & Lawhon, for appellant.—The plaintiff must allege that the person whose act caused the injury was the servant of the defendant, and he must allege matters of fact to show that the act complained of was within the scope of such agent's or servant's authority under his employment. St. Louis S. W. Ry. Co. v. Mayfield, 35 Texas Civ. App., 82; 13 Am. & Eng. Ency. Pleading and Practice, 922; 26 Cyc., 1571-2.

The relation of master and servant must exist between the defendant and the person for whose acts liability is claimed, and it must be shown that the acts complained of were done within the scope of such agent's or servant's employment and in furtherance of the master's business at the time of the commission of such acts. Lytle v. Crescent News Co., 27 Texas Civ. App., 530; Galveston, H. & S. A. Ry. Co. v. Currie, 100 Texas, 136; Houston & T. C. Ry. Co. v. Bell, 97 Texas, 71; International & G. N. R. Co. v. Anderson, 82 Texas, 516; Texas & P. Ry. Co. v. Black, 87 Texas, 160; Fairbanks v. Boston Storage & W. Co., 109 Am. St. Rep., 646; 26 Cyc., 1534 to 1539; 20 Am. & Eng. Ency Law, 171; Perlstone v. American Exp. Co., 52 L. R. A., 959; McDermott v. American Brewing Co., 52 L. R. A., 684.

If an act done by the servant while engaged in the work of the master is in resentment of personal affronts or as a punishment for conduct of plaintiff, and not done as a means or for the purpose of performing the work of the master, but for the accomplishment of the independent or mischievous purpose of the servant, such act is not the act of the master, and the master will not be liable therefor. Galveston, H. & S. A. Ry. Co. v. Currie, 100 Texas, 136; Houston & T. C. R. Co. v. Bell, 75 Texas, 484.

If the servant acts in his own behalf or for his own protection, he is not acting for the master, and the master will not be liable. Same authorities; also McDermott v. American Brewing Co., 52 L. R. A., 684; Lafitte v. New Orleans City & L. R. Co., 12 L. R. A., 337.

Rodman S. Cosby and *A. D. Lipscomb,* for appellee.—Where there has been a mingling of personal motive or purpose of the servant with the doing of his work for his employer, it is well settled in this State that the presence of such motive in the mind of the servant does not affect the master's liability, when the doing of the work is in the line of the servant's duty. The turning aside from the master's business must be complete. Galveston, H. & S. A. Ry. Co. v. Currie, 100 Texas, 136; Burnett v. Oechsner, 92 Texas, 588; International & G. N. R. Co. v. Cooper, 88 Texas, 607.

REESE, ASSOCIATE JUSTICE.—L. Sobel instituted this action against Wells-Fargo & Co. Express, a corporation, to recover $2,000 actual and $3,000 exemplary damages for an assault alleged to have been committed upon him by one D. J. Coleman, an employe of defendant, while the said Coleman was engaged in the performance of his duties as such employe, the said employe then and there, in making such assault, acting within the scope of his duties as such. It was also alleged that, after the assault had been committed, defendant,

with a full knowledge of the circumstances, ratified the same. The defendant by way of answer urged a general demurrer and several special exceptions to the petition. The general demurrer and all the special exceptions but one were sustained, whereupon the plaintiff filed a trial amendment, and defendant by supplemental answer renewed its special exceptions to the petition as amended, which were overruled. Defendant also made general denial.

Upon a trial without a jury the court rendered judgment for plaintiff for $250 actual damages. From the judgment defendant appeals. The trial court filed conclusions of fact and law.

The first three assignments of error assail the ruling of the trial court in overruling several special exceptions to the petition. There is no merit in either of the assignments, nor the several propositions thereunder, and they are severally overruled.

The other assignments attack the judgment on the ground generally that the undisputed evidence shows that the man Coleman, in making the assault upon appellee, was not acting within the scope of his employment as agent and servant of appellant, but independently and in his own private quarrel, and that, therefore, appellant is not liable. By way of answer to these assignments, which we have concluded present no error, we here set out the conclusions of fact and law of the trial court, which are here adopted as our conclusions.

"The plaintiff, a merchant in the city of Beaumont, in the latter part of 1907, had a shipment of gloves to him from the wholesale house of Mason, Campbell & Co., at Poughkeepsie, N. Y., same coming into Beaumont through the defendant company, which is a corporation and operates as a common carrier of goods by rail, maintaining an office in the city of Beaumont then under the superintendence of the witness Smith. When the goods arrived at the Beaumont office of defendant they were sent to plaintiff's place of business by defendant's local delivery wagon. The package appearing to be in bad order, plaintiff declined to take them without their being checked up and compared with his bill received from the shipper. The driver for defendant carried them back to the office, as the rules of the company require such matters to be adjusted at the office. Later plaintiff went to defendant's office with the bill, and was referred to the 'on-hand' clerk, the witness Coleman. The gloves were counted by this clerk two or more times with varying results, sometimes finding more and sometimes less than called for by the bill, and plaintiff, who was present and saw the goods opened, accepted them, saying that if there were only two or three pairs short he would make no complaint. At his shop, however, he counted them himself, and found the package wanting in fourteen pairs called for by the bill. He promptly returned to the office of defendant, but, it appearing that the clerks had gone for the day, he did not take the matter up with them until the next day. On the next day the defendant, through its superintendent and 'on-hand' clerk, declined to reopen the question, declaring it settled by the plaintiff's having receipted for the goods as being in good order. Plaintiff then sent forward his check to Mason, Campbell & Co., for the amount of the bill less the price of the fourteen pairs, together with an affidavit declaring that the

package had been delivered to him by defendant short of fourteen pairs, suggesting that they put in their claim against the express company. This course was taken by Mason, Campbell & Co., the claim being lodged by them with the American Express Co., defendant's connecting carrier. The file of papers and correspondence relating to the claim finally came to the office of defendant at Beaumont, and the report from defendant through its 'on-hand' clerk was that the goods had been receipted for as in good order by plaintiff. This report reached Mason, Campbell & Co., who then wrote to the plaintiff demanding pay for the balance of the bill. Plaintiff sent a reply, saying that he did not intend to pay for what the clerks of the express company stole, and insisting that his statement of the quantity of the gloves was correct, and claiming that the clerk had miscounted. He referred to the clerk as a shyster. This letter in turn found its way into the files of the defendant company and was by them referred to the 'on-hand' clerk, the witness Coleman, for his attention. On reading the letter he appeared to have shown it to others of the clerks and employes of defendant company. On the same day he, Coleman, went one or more times to plaintiff's place of business, telling plaintiff he should come to the express office and adjust the claim of shortage, and the driver of one of the defendant's wagons also left a message or request with the plaintiff. Plaintiff, having no clerk, waited for his children to return from school so that he could leave the store in their charge, and immediately afterwards went to the office of defendant, as requested, thinking that the claim would be adjusted so as to relieve him of claim from Mason, Campbell & Co. On reaching the office he was directed into the rear part of the building, where Coleman was standing by a barrel with the file of papers relating to the claim in his hand and another clerk close by, and as plaintiff came up he, Coleman, reproached plaintiff about the insulting letter. Then after some words of conciliation on plaintiff's part, the witness Coleman produced a paper for plaintiff to sign, and by commands and threats, and threatening gestures and manner, compelled plaintiff to sign same, the plaintiff signing without reading; then as plaintiff raised his head from a stooping posture, assumed in signing the paper over the barrel, the witness Coleman struck plaintiff in the mouth, loosening one of his teeth, which afterwards fell out, and at the same time threatening further violence if complaint should be filed with the civil authorities. The bystanding clerk and the witness Coleman then signed as witnesses the document which plaintiff had thus been compelled to sign, and same became part of the files of the office relating to this claim, and was regularly thereafter used by the defendant in its correspondence with the American Express Co., and in the usual course of its business relating to the claim. The substance of the document which the plaintiff was thus compelled to sign was a withdrawal of his claim for a shortage in the package of gloves and a retraction of his remarks as to thieves among the express company's clerks. The obtaining of a statement in regard to the claim from plaintiff was in the line of employment of the 'on-hand' clerk,

Coleman. I estimate the actual damage of plaintiff, arising out of the assault, at two hundred and fifty dollars.

"*Conclusions of law.*—It being within the line of employment of the witness Coleman, as an agent of defendant, to discuss the claim with plaintiff, and to obtain statements and other evidence tending to settle the question of defendant's liability for the shortage, it is my conclusion that the defendant is liable for the injury caused by Coleman to plaintiff in the performance of the service. Had the assault been committed merely in resentment of the offensive words contained in the letter, as would have been the necessary conclusion if Coleman had committed the assault at the time when he went to request the attendance of the plaintiff at the office, then the defendant would clearly not have been liable. But the witness, to whom certain business of defendant was customarily entrusted as agent, chose to make the assault and forcibly exacted retraction as a part of the performance of this customary service for the defendant. When one acts through an agent he trusts the agent as to the manner of performance, and it must be assumed that he has selected the agent because satisfied that the agent would act as he would act under the circumstances. If this trust or confidence be misplaced, and if the agent, foregoing his opportunities to vindicate himself in his personal capacity, chooses rather to mingle his personal resentment with his service as agent, and share his responsibility for it with his employer, the employer who has selected him has little ground to complain of being held responsible for his wrongful acts, while the individual who, unable to select the person with whom he will transact such business as he has with the principal, suffers from the misconduct of the agent in the transaction of the business, may reasonably expect the principal to discharge the liability for such misconduct. It is impossible to separate the performance of a service as agent from the manner of the performance.

"The principal has the selection of his agent, and where such principal chooses to act, or must perforce act through its agents, their wrongful acts committed in the performance of the service are the wrongful acts of the principal. In estimating the damage I have taken into account the wrongful conduct of plaintiff in using the insulting language."

We find no error, and the judgment is affirmed.

Affirmed.

Writ of error refused.

DUTCH EPPERSON v. INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY.

Decided February 2, 1910.

1.—Negligence—Contributory Negligence—Person Insensible on Railway Track.

Evidence considered and held to support a verdict for defendant in a case where one lying insensible upon a railway track at a point remote from stations was struck and injured by a train.

2.—Same—Charge.

One falling insensible upon a railway track, without negligence, would not be precluded from recovery for injury caused by negligence of those operating a train, as by their failure to keep a lookout for persons on the track where the circumstances require such lookout as an exercise of ordinary care. But if the injured person knew himself to be liable to sudden attacks of unconsciousness and his act in entering and walking along the track with such knowledge be found to be negligence, then, if rendered insensible there by such weakness, his negligence would prevent his recovery for injury caused to him in such situation by defendant's negligent failure to discover him in time; defendant in such case could become liable only under the rule applicable in cases of discovered peril. See charges approved as a correct presentation of these principles.

3.—Negligence—Speed of Train—Charge.

A railway has the right to run its train at such speed as it chooses at points between stations, so far as concerns the rights of trespassers or licensees walking or lying on its track. See charge to this effect approved.

4.—Contributory Negligence—Sleeping on Track.

One voluntarily lying down to sleep on a railway track is guilty of negligence precluding his recovery for injuries caused by negligence of those operating trains thereon. Charge approved and held warranted by evidence.

5.—Same—Liability to Attacks of Unconsciousness.

Evidence considered and held sufficient to raise and require the submission of the issue as to contributory negligence by plaintiff in entering on and walking along a railway track with knowledge of his liability to attacks rendering him unconscious.

Appeal from the District Court of Milam County. Tried below before Hon. J. C. Scott.

W. W. Chambers and *Freeman & Kidd,* for appellant.—It was shown in the trial, conclusively and by uncontroverted evidence, that negligence on the part of the defendant's employes was the cause of injuries to plaintiff, not caused or contributed to by any negligence on his part. Houston & T. C. Ry. Co. v. Sympkins, 54 Texas, 620-622; Texas & P. Ry. Co. v. Watkins, 88 Texas, 20; Ft. Worth & D. C. Ry. Co. v. Longino, 54 Texas Civ. App., 87; Missouri, K. & T. Ry. Co. v. Hammer, 34 Texas Civ. App., 354; St. Louis S. W. Ry. Co. v. Bolton, 36 Texas Civ. App., 87; Houston & T. C. Ry. Co. v. Harvin, 54 S. W., 631; Texas & P. Ry. Co. v. Phillips, 37 S. W., 621, 622; Galveston City Ry. Co. v. Hewitt, 67 Texas, 479; Olivaras v. San Antonio & A. P. Ry. Co., 77 S. W., 983; Galveston, H. & N. Ry. Co. v. Olds, 112 S. W., 791, 792; Ft. Worth & D. C. Ry. Co. v. Poteet, 53 Texas Civ. App., 44; San Antonio & A. P. Ry. Co. v. Vaughn, 5 Texas Civ. App., 195; Missouri, K. & T. Ry. Co. v. Malone, 102 Texas, 269; Chamberlain v. Missouri, K. & T. Ry. Co., 33 S. W., 440; Gunn v. Ohio River Ry. Co., 36 W. Va., 165; Indianapolis, P. & C. Ry. Co. v. Pitzer, 6 N. E., 310; Bottoms v. Seaboard & R. Ry. Co., 19 S. E., 730; Mitchell v. Boston & M. Ry. Co., 34 Atl., 674; Chicago, B. & Q. Ry. Co. v. Grablin, 56 N. W., 796; Southern & N. A. Ry. Co. v. Donovan, 4 So., 142; Townley v. Chicago, M. & St. P. Ry. Co., 11 N. W., 55; Smith v. Norfolk & S. Ry. Co., 25 L. R. A., 287-290; Eppstein v. Missouri Pac. Ry. Co., 94 S. W., 970; Frye v. St. Louis, I. M. & S. Ry. Co., 8 L. R. A., 1076, note III.

The court assumes and, in effect, instructs the jury that negligence, of whatever character, on the part of the plaintiff in originally going upon the track, would be contributory negligence, precluding his recovery, regardless of the question of his subsequent mental attack, as an independent, efficient cause, intervening between such negligence and the injury. Houston & T. C. Ry. Co. v. Sympkins, 54 Texas, 620-622; San Antonio & A. P. Ry. Co. v. Trigo, 101 S. W., 256, 257; Galveston, H. & S. A. Ry. Co. v. Ware, 67 Texas, 636, 637; Brandon v. Gulf City, C. P. & Mfg. Co., 51 Texas, 128, 129; Missouri, K. & T. Ry. Co. v. Dobbins, 40 S. W., 865, 866; Seale v. Gulf, C. & S. F. Ry. Co., 65 Texas, 277-280; 29 Cyc., 529; Pittsburg Reduction Co. v. Horton, 113 S. W., 648, 649.

The court instructs the jury that negligence on the part of the plaintiff in originally going upon the track or in "being thereon," or in his conduct while thereon, would be contributory negligence, precluding his recovery, whether or not such negligence proximately contributed to cause his injury. Hardin v. Ft. Worth & D. C. Ry. Co., 100 S. W., 996; Eads v. City of Marshall, 29 S. W., 171; Paris, M. & S. P. Ry. Co. v. Nesbitt, 38 S. W., 243, 244; Chicago, R. I. & P. Ry. Co. v. Buie, 31 Texas Civ. App., 654; Gulf, C. & S. F. Ry. Co. v. Carter, 71 S. W., 75; Adams v. Gulf, C. & S. F. Ry. Co., 105 S. W., 527, 528; International & G. N. R. Co. v. Garcia, 75 Texas, 591; St. Louis & S. F. Ry. Co. v. McClain, 80 Texas, 95; St. Louis S. W. Ry. Co. v. Parks, 40 Texas Civ. App., 480; 7 Am. & Eng. Ency Law, 373, 392, 395.

S. R. Fisher and *S. W. Fisher* (King & Morris, of counsel), for appellee.—Plaintiff's injuries were directly and proximately caused by his voluntary and wanton act of going upon and lying on or near defendant's track when his presence thereon could not, under the circumstances then and there existing, have been discovered by those operating the train in time to have saved him from hurt. Texas & P. Ry. Co. v. Breadow, 90 Texas, 27; Texas & P. Ry. Co. v. Staggs, 90 Texas, 460; Ft. Worth & D. C. Ry. Co. v. Shetter, 94 Texas, 199; St. Louis S. W. Ry. Co. v. Shiflet, 98 Texas, 326; Texas & P. Ry. Co. v. Shoemaker, 98 Texas, 451; Gulf, C. & S. F. Ry. Co. v. Mathews, 100 Texas, 65; Texas Midland Ry. Co. v. Byrd, 102 Texas, 263; Missouri, K. & T. Ry. Co. v. Malone, 102 Texas, 269; International & G. N. R. Co. v. Ploeger, 96 S. W., 56; Creagers, Adm'r., v. Illinois Cent. R. Co., 121 S. W., 458.

RICE, ASSOCIATE JUSTICE.—Appellant brought this suit for the recovery of damages for personal injuries sustained by him on account of being run over by one of the cars of appellee company, while, as he claimed, he was lying in an insensible condition upon its track, it being averred that the track at the point where he was injured was, with knowldge and acquiescence of appellee, commonly and generally used by the people of the vicinity, thereby casting upon appellee the duty of keeping a lookout to avoid injury to those so using it; the negligence relied upon in this instance for recovery being that appellee

failed to exercise ordinary care to keep such lookout to discover appellant's danger in time to have averted the injury.

Appellee replied by general demurrer, special exceptions, general denial, and plead specially contributory negligence on the part of appellant in voluntarily going to sleep upon the track of appellee, whereby he contributed to his injury; and further, that he was a trespasser on the track of appellee at the time and place where it is alleged he was injured, and that the company rested under no obligation to maintain a lookout to discover his presence on or near the track, but only rested under the duty to exercise due diligence and care to avoid running over him after his presence was discovered, and that its servants in charge of the train did not discover his presence or the danger to which he was exposed until it was too late, by the exercise of due care, to avoid running upon or against him.

There was a jury trial and verdict and judgment in behalf of the defendant, from which appellant prosecutes this appeal.

Appellant's first assignment of error presents the contention that the verdict and judgment in behalf of the defendant was contrary to and against the law and the evidence, in that it was conclusively shown thereby that negligence on the part of appellee's employes, while on duty in its service, was the direct and proximate cause of his injuries, it appearing therefrom that he was not guilty of contributory negligence.

The accident which resulted in appellant's injury occurred on a fenced portion of the railway track some three miles north of Gauze, in Milam County, on the 23d of June, 1907. It appears that on the evening of this day he was walking on the railway track, returning from a neighbor's house to get his horse, which he had left near his sister's. The distance that he would necessarily have had to walk on the track for this purpose was something like a quarter of a mile. It was shown that about a year before this time appellant had twice suffered while at work from attacks brought on by being overheated, which rendered him for a while thereafter unconscious; and the testimony introduced by him indicated that on the evening in question, after getting upon the track, that he was overcome by a similar attack, from which he did not regain consciousness until after he was struck by the northbound passenger train, which was due about that time in the evening. The track was shown to have been straight for some two or three miles south from the point where he was injured, and it is his contention that if a lookout had been kept by those operating the cars of appellee they would have discovered him in time to have prevented the injury, and, failing so to do, they were guilty of negligence which authorized a recovery on his part against the company.

It is shown on the part of the company that a lookout was kept on the part of the fireman and engineer, but that owing to the lateness of the evening, and the shadows from the trees and woods through which they were running, they failed to discover appellant's presence on the track until within 90 or 100 feet, whereupon they immediately blew the whistle, cut off the steam and threw the emergency brake, and did everything else in their power to stop the train before

it came in contact with him, but that the cars could not be stopped within that distance, since they were going at the rate of 45 miles an hour, which was their usual and customary speed; and further, that it was shown that appellant had stated to them, after being injured, that he had become weary and laid down upon the track for the purpose of resting, and had gone to sleep, and, therefore, that they were not guilty of negligence, but that appellant was guilty of contributory negligence in going to sleep upon the track, and that the verdict was justified by the facts.

The issues thus raised were submitted by the court in an admirably clear charge for the consideration of the jury. The facts above outlined, supplemented by other evidence in the record unnecessary to here set out, are, in our judgment, sufficient upon which to predicate a verdict in behalf of the appellee. Hence we are constrained to overrule this assignment, and hold that the same is not well taken.

The second assignment complains of the latter part of paragraph 6 of the court's charge, on the ground, first, that the same assumes, and, in effect, instructs the jury, that negligence, of whatever character, on the part of the plaintiff, in originally going upon the track, would be contributory negligence precluding his recovery, regardless of the question of his subsequent mental attack as an independent, efficient cause intervening between such negligence and the injury; and by his second proposition urges that said charge likewise, in effect, instructs the jury that negligence on the part of the plaintiff in originally going upon the track would be contributory negligence which would preclude recovery, irrespective of whether such negligence proximately contributed to cause said injury. The entire section of the charge involved by this assignment reads as follows:

"6. If you believe from the evidence that the plaintiff, while on the defendant's railway track, was struck and injured by its said train, and you also believe from the evidence that the plaintiff was guilty of negligence in being on said track at the time and place and under the circumstances and conditions of his being thereon, or if you believe from the evidence that he failed, while on the track, to keep a reasonably careful lookout for the approaching train and was thereby guilty of negligence; or if you believe from the evidence that he went to sleep on the track and was thereby guilty of negligence; or if you believe from the evidence that he voluntarily remained on the track till the train approached and struck him, and was thereby guilty of negligence; and if you further believe from the evidence that any such negligence, if any, on the part of the plaintiff proximately caused or contributed to cause his injuries, if any he sustained, then you will find for the defendant, even though you believe from the evidence that the defendant's employes operating the engine of said train were guilty of negligence which proximately contributed to cause such injuries. But in this connection you are instructed that if the plaintiff was not guilty of negligence in going upon said track for the purpose and under the circumstances and conditions of his going thereon; and if you believe from the evidence that, while on said track, he was attacked and overcome by a mental disturbance which rendered him insensible and irresponsible for his acts, and that

while in such insensible and irresponsible condition, if any, he was struck and injured by the defendant's said train; and if you further believe from the evidence that, up to the time he was attacked and overcome by such mental disturbance, if he was so attacked and overcome, he was not guilty of negligence in being upon said track, or in his conduct thereon, then he would not be guilty of contributory negligence."

The above charge, when taken together, we do not think is open to the objection raised, because the portion objected to, when considered with reference to the first part thereof, as contended by appellee, correctly instructed the jury that if they found that plaintiff, while upon the track, was overcome by a mental disturbance, which rendered him insensible and irresponsible for his acts, he would not be guilty of an act of contributory negligence to his injury, if they further found that plaintiff was not, up to the time of such mental disturbance, if any, guilty of negligence in going upon the track and in his conduct while upon the track. So that, at last, his contributory negligence was made to depend upon the fact as to whether or not he was guilty of negligence in the first instance in going upon the track with knowledge of his condition, which statement, we believe, is a correct enunciation of the law, for it is certainly true that a man who was demented or who was suddenly stricken by some providential cause, and thereby rendered unconscious, could not, on account thereof, be held guilty of contributory negligence; but the negligence, if any, would consist of going or being upon the track with the knowledge on his part that he might likely while there be overtaken by some such mental disturbance, which we think should have been anticipated by him on account of former similar attacks. If the engineer or those in charge of the train used or exercised ordinary care to discover the plaintiff, but, after so doing, failed to see him in time to avoid the injury, the company could not be held responsible, even though appellant should be held free from contributory negligence by reason of his want of mental capacity to appreciate his danger and avoid the same.

At the instance of appellee, the court gave the following charge: "You are instructed that the International & Great Northern Railroad Company had the right to use its track for its train, and to run its train thereover at any rate of speed which it saw fit, and persons undertaking to use or using said track to walk thereon did so subject to that right; and you are further instructed that if you believe from the evidence that, at the time of the accident to plaintiff, defendant's train was being operated over its track at the rate of about 45 miles per hour; that the operators in charge of defendant's train were exercising ordinary care to keep a lookout, and that in the exercise of such care they failed to discover plaintiff's presence in the place of danger until it was too late to stop or stay the progress of said train in time to avert the accident to plaintiff, then you must find in favor of the defendant."

This charge is assailed under appellant's third assignment, first, on the ground that it is calculated to induce the jury to believe that defendant's employes, in charge of the engine which struck plaintiff,

were not charged with the duty of exercising ordinary care to avoid injuring him; and it is likewise assailed on the further ground that it is inconsistent and in conflict with the second sentence of said special charge and with paragraphs 1 and 3 of the court's main charge, which embodied a correct instruction on the vital issue in the case; and, third, it is insisted that it was erroneous in that it repeats an instruction embodied in the main charge. The court in its main charge instructed the jury, among other things, that it was the duty of those in charge of the engine to keep a lookout, and that a negligent failure so to do, proximately causing the injury, would entitle the plaintiff to recover, unless he was guilty of contributory negligence, etc. We think the special charge asked and given is not subject to the criticism urged against it, because the appellee had the right at the place of the accident, it being in the country, to operate its train at such speed as it saw proper, consistent with the safety of its passengers, provided it exercised ordinary care in so doing.

The following special charge was also given at the instance of appellee: "You are instructed that if you believe from the evidence that the plaintiff, Dutch Epperson, voluntarily sat or laid down on the bridge at or near which he was injured, or went to sleep thereon, then you must find in favor of the defendant, without regard to any other issue in the case." There was evidence to the effect that the appellant sat down upon the track to rest and went to sleep while there, and this charge was based upon this evidence and justified thereby. See Beach on Contrib. Neg., section 197, p. 292.

The sixth assignment complains of the following charge of the court given at the instance of appellee: "You are instructed that if you believe from the evidence that the plaintiff went upon the defendant's track, and into a place of danger; that he had theretofore had attacks or lapses from consciousness; that a person of ordinary prudence, under the same or similar circumstances, knowing that he had been so subject to said attacks or lapses from consciousness, would not have gone upon defendant's track as plaintiff did; and that plaintiff thereafter had such attack or lapse from consciousness and fell or lay upon defendant's track until he was struck and injured, and that the act of plaintiff in going upon said track under such cirsumstances was negligence which directly and proximately contributed to causing the accident, then you must find in favor of defendant." The evidence, in our jugdment, was sufficient to raise the issue presented by this charge. It has frequently been held that it is the duty of the court to affirmatively present the law to every issue raised by the evidence. See Missouri, K. & T. Ry. Co. v. McGlamory, 89 Texas, 635; Gulf, C. & S. F. Ry. Co. v. Denson, 72 S. W., 70; San Antonio & A. P. Ry. Co. v. Kiersey, 98 Texas, 591; St. Louis S. W. Ry. Co. v. Hall, 98 Texas, 480.

The remaining assignments have been considered, but are regarded as not well taken, and are therefore overruled.

Finding no error in the proceedings of the court below, its judgment is affirmed.

Affirmed.

WILLIAM J. SUTOR ET AL. v. INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY ET AL.

Decided February 2, 1910.

1.—Easement—Prescription.

Evidence to show an easement in plaintiff upon a lot conveyed by him to defendant for its use for access to his own adjoining lot and as an alley or passway for the public, considered and held insufficient to show such easement either by dedication, prescription or estoppel, and which warranted a peremptory instruction for defendant.

2.—Prescription—Way.

Use of a vacant city lot by pedestrians in "cutting across lots" between certain points, could not be considered adverse to the owner where there was no evidence that it was done in the assertion of a right.

3.—Estoppel.

One permitting without objection the owner of a lot adjoining his own to let same to a tenant for building, and the tenant to erect a permanent and valuable brick building thereon would seem to be estopped from subsequently asserting against them an easement in the lot requiring the removal of such building.

4.—Written Instrument—Parol Evidence to Alter.

One conveying a lot to another by unqualified deed in fee simple, can not alter its effect by showing that the grantee represented that the property was to be used only in a certain way, as that it was to be left open and used only for railroad purposes, whereby the public could have access to the grantor's premises across the lot conveyed.

5.—Railway—City Ordinance.

A city ordinance imposing upon a railway regulations in regard to the use of its own property as a condition of a grant of certain rights by the city, is ineffective where the ordinance was not accepted by the company.

6.—Assignment of Error.

An assignment of error not found in the record nor presenting fundamental error, but raised for the first time in the brief, will not be considered.

Appeal from the District Court of Travis County. Tried below before Hon. Charles A. Wilcox.

Fiset & McClendon and *Robertson & Robertson,* for appellants.—It was error to give a peremptory instruction for defendant. International & G. N. R. Co. v. Cuneo, 47 Texas Civ. App., 622; Evans v. Scott, 37 Texas Civ. App., 373; Hall v. City of Austin, 20 Texas Civ. App., 59; Galveston, H. & S. A. Ry. Co. v. Baudat, 21 Texas Civ. App., 236; Sayles' Stats., articles 3347 and 3351.

The fact that the railroad company may at times have jointly used lot No. 1 in such a way as not to be inconsistent with the use by the public does not defeat the prescriptive right. Fitchburg R. Co. v. Page, 131 Mass., 391; Webster v. Lowell, 142 Mass., 340; Zimmerman v. Snoden, 88 Mo., 218; Patton v. State, 50 Ark., 54; Toof v. City of Decatur, 19 Ill. App., 204; Cunningham v. San Saba, 11 Texas Civ. App., 557; Elliott on Roads and Streets, section 175, note 4; page 189, note 2; 2 Dillon, section 637; 2 Greenleaf, section 545.

Evidence of long continued use by the public establishes the character of a road as public. McWhorter v. State, 43 Texas, 666; Elliott on Roads and Streets, sections 169-173.

Where one uses an easement whenever he sees fit, without asking leave and without objection, it is adverse. Garrett v. Jackson, 20 Pa. St., 331.

That intention to dedicate may be shown by conduct, and that time is a circumstance bearing upon such intention, see Evans v. Scott, 37 Texas Civ. App., 373; Missouri Pac. Ry. Co. v. Lee, 70 Texas, 499. That dedication does not require that the owner give up all right to the property dedicated, see Lamar County v. Clements, 49 Texas, 355. That intention to dedicate may be shown by parol evidence of acts showing assent, see 2 Dillon, 636; Missouri Pac. Ry. Co. v. Lee, 70 Texas, 499. That user and acquiescence for the statutory period of limitation is sufficient evidence of such intention, see 2 Dillon, sections 637, 638. That intention to dedicate is a question of fact, see Missouri Pac. Ry. Co. v. Lee, above. That dedication does not require acceptance by the authorities, and may be by individuals acting upon the faith of the dedication, see Oswald v. Grenet, 22 Texas, 100. That dedication is a question of estoppel, and acts showing dedication constitute dedication, regardless of the owner's actual intention, see Evans v. Scott and Missouri Pac. Ry. Co. v. Lee, supra; also as bearing upon the issue of dedication, see Green v. Stevens, 49 Ill. App., 24; State v. McGee, 40 Iowa, 595; Kelsey v. Furman, 36 Iowa, 614.

Limitation does not run against the city: Sayles Stats., art. 3351.

The evidence of witness Metz tended to show that the defendant company was estopped to deny the right of the Sutors to have the said lot maintained as an open public way. Harrison v. Boring, 44 Texas, 269; Lamar County v. Clements, 49 Texas, 357; Risien v. Brown, 73 Texas, 142; Weynand v. Lutz, 29 S. W., 1099.

The allegations excepted to constituted within themselves a cause of action entitling plaintiff to the relief sought, and the sustaining of said exception was fundamental error of law, apparent upon the face of the record. Wilson v. Johnson, 94 Texas, 276; Harris v. Petty, 66 Texas, 516; Texas Brewing Co. v. Templeman, 90 Texas, 281; City of San Antonio v. Talerico, 98 Texas, 155; San Antonio Trac. Co. v. Faircloth, 97 S. W., 507.

S. R. Fisher, J. H. Tallichet and *S. W. Fisher* (*King & Morris,* of counsel), for appellees.

FISHER, CHIEF JUSTICE.—This suit was instituted February 19, 1908, by W. J. Sutor, as lessee, and Mrs. E. H. Sutor, as owner, of lot No. 2 in block 29 of the city of Austin, against the International & Great Northern Railroad Company, owner, and Otto Wahrmund, lessee, of lot No. 1 in said block. On April 10, 1908, there was filed an intervention by the city of Austin, and on the same day the parties filed an amended original petition, in which the Sutors and the City of Austin appeared as plaintiffs and Thomas J. Freeman, as receiver of the International & Great Northern Railroad Company was named as additional party defendant.

The cause of action asserted in the pleadings of the appellants was to establish an easement or right of way over lot No. 1, in block 29, owned by the defendant railroad company and held by defendant Wahrmund under a lease from the company, and for an injunction requiring the defendants to remove the obstruction from the lot, and for a decree declaring the property an open street-way and sidewalk, and divesting out of the defendants all right and title to the property, and for general relief. The grounds upon which this relief was sought were, first, prescription; second, dedication on the part of the railroad company, and third, what the appellants term in their brief an estoppel.

The defendants answered by general denial of all the allegations contained in plaintiff's petition, except that on October 3, 1876, the plaintiff, Mrs. Emily Sutor, and her deceased husband, sold and conveyed the lot in controversy to the International & Great Northern Railroad Company, under a general warranty deed for a consideration of $3,000, that being the full value of the same; that it owned and held and claimed the same ever since, and still so owned the same by fee simple title. The defendants pleaded also the statutes of limitation of three, five and ten years. The defendants also specially excepted to paragraph 6 of the petition, which exception was sustained and the paragraph stricken out.

The case was tried in October, 1908, and at the close of the evidence the court peremptorily instructed the jury to return a verdict in favor of the defendant, which was done, and judgment entered accordingly.

The principal assignments of error question the action of the trial court in peremptorily instructing a verdict, for the reason, as insisted by appellants, that the evidence was sufficient to require each of the issues—that is, prescription, dedication and estoppel—to be submitted to the jury. The principal facts, as we view the evidence, are as follows:

The International & Great Northern Railroad Company entered the city of Austin either in 1876 or 1877. In 1876 the railroad company obtained from the city of Austin the right to use Third Street, among other streets, for its tracks, and in 1876 the railroad company purchased from the plaintiff Mrs. Sutor and her husband, who was then living, lot No. 1 in block 29. This lot is bounded on the north by lot No. 2, which is owned by Mrs. Sutor and now used and occupied by a building known as the Sutor Hotel; it is bounded on the west by an alley that runs north and south through block No. 29 from Fourth Street to Third Street. Its south boundary is Third Street, with an east frontage on Congress Avenue. The alley mentioned has been used for public travel for many years. This lot is known as lot No. 1, the southeast lot of block 29. The railroad company, on entering the city of Austin, established its depot across Third Street from lot No. 1, fronting on Third Street and Congress Avenue. A short time—the exact time is difficult to determine—from the time of the establishment of its depot, the railroad company occupied with one of its tracks about sixteen feet of the south side of lot No. 1. Since the railroad has been built, and possibly prior to that time, up

to a few years ago, at the time when Congress Avenue was paved, the front of lot No. 1, facing on Congress Avenue, was not accessible to vehicles and horsemen on account of an open gutter or ditch on Congress Avenue in front of the lot; but the lot was open, and not enclosed, except the railroad company erected posts on the lot, from which extended chains, but the time this was done is not definite, and there is some evidence tending to show that these chains were at times removed from the posts. In 1891 or 1892 the Sutors caused to be erected on the adjoining lot No. 2 the building known as the Sutor Hotel. A door or opening was left in the south side of this building which opened on to lot No. 1. In 1897 appellee Wahrmund, under a lease executed by the railway company to him, erected upon lot No. 1, fronting on Congress Avenue, a building used and occupied as a saloon. This building closed up the Congress Avenue entrance to the lot, and it has been continuously occupied and used by him since that date under the lease from the railroad company. In 1903 the railroad company executed a lease to the Sutors, granting to them the privilege of extending galleries to be attached to the Sutor Hotel on the south, over and above lot No. 1. In that instrument the Sutors admitted the ownership in the International & Great Northern Railroad Company of the lot in question. From the time the railroad company purchased the lot in question from the Sutors up to the time that the Sutor Hotel was erected in 1891 or 1892, the only use of the lot by the public was by pedestrians, who made it convenient in going from one point to another to walk across the lot. It was never used by horsemen or by vehicles. During the progress of the erection of the Sutor building, in 1891 or 1892, the contractor, for his convenience, constructed across the gutter or ditch, in front of the lot on Congress Avenue, a bridge, in order that he could haul upon the lot the material to be used in the building. This continued only for a few months during the progress of the work. After the building was completed the Sutors used the south entrance of the building for the purpose of receiving their goods, etc., used in operating the hotel, and for this purpose wagons drove up to this south entrance, evidently entering the lot from the west end, either through the alley or Colorado Street, the street immediately west, but did not enter from Congress Avenue. After the Wahrmund building was erected in 1897 such use was discontinued. It does not appear that during this period the city or the Sutors asserted any prescriptive right in the property, nor was there ever established any highway across the lot, such as a street, alley or sidewalk; nor does it appear that the railroad company was ever informed that any such right would be asserted by the appellants. It is true that the evidence would justify the assumption that the railroad company knew of the use of the lot by pedestrians, and possibly the additional use to which it was put by the Sutors for the six or seven years' occupancy prior to the time that the appellees took actual possession by building and erecting the structure used as a saloon. The use by the pedestrians, which we regard as merely permissive by the railroad company, could be considered as nothing more than what is termed "cutting across lots." It is a use frequently made of vacant lots in cities, where pedestrians going to and from cer-

tain points for a matter of convenience will cross the lots without following the streets or sidewalks, and such use could hardly be regarded by the owner as adverse to his rights, unless connected with some other facts indicating that the purpose was to create or establish a way for the benefit or convenience of the public. The only additional use to that made by the pedestrians which could have any force at all was that of the Sutors in driving and causing to be driven over the lot vehicles for the purpose of delivering at their south door articles to be used in conducting their hotel, but that was only for about six or seven years, a time too short upon which to base a prescriptive right.

It is clear, from the facts, that they are not sufficient to establish dedication; in fact, the evidence upon this subject is much weaker than was the evidence in International & Great Northern Railroad Co. v. Cuneo, 47 Texas Civ. App., 622, 108 S. W., 704, in which we held that the testimony was not of force sufficient to establish dedication.

There is nothing in the issue of estoppel favorable to the appellants, but there is much tending to establish the fact that the appellants were estopped in their remedy by which they seek to have the building abated and removed or destroyed, and a public way opened over the lot in question. Krause v. City of El Paso, 101 Texas, 211, 106 S. W., 121. Of course, the time of actual occupancy of the building by the appellees in this case was not as long as the time mentioned in the case cited, but we do not regard the time so much as material, provided the facts are of such a character as to indicate that it would be inequitable to apply the harsh remedy invoked by the appellants in this case. The actual occupancy of the building by Wahrmund was over ten years prior to the time of filing this suit. The appellants knew that the building was being erected, and knew that the front entrance to the lot would be closed. The city made no objection and asserted no claim, either by donation, prescription or otherwise, over the lot in question. They had never established or recognized any public way across the lot, nor was any sidewalk established or maintained there. They evidently knew that the work was going on, and that thereby the Congress Avenue entrance to the lot would be closed up. By the deed from the Sutors to the railroad company the appellants evidently knew that the legal title to the lot in question was in the railroad, and that they were asserting one of the rights of ownership by erecting upon the lot a building, unless there should be interposed some right of the city and the Sutors to its erection. They remained silent and took no active steps to prevent the work, and made no complaint.

We are cited to the Cuneo case by the appellants for authority in this instance for maintaining their cause of action on the ground of prescription. We did affirm the Cuneo case, holding that the evidence was sufficient to establish the issue of prescription, but it was an extremely close case on the facts. But, however that may be, it is clear that the evidence here is not as strong as it was in that case. It amounts to nothing more than a permissive use by pedestrians, if we eliminate the additional use pointed out by the Sutors; and, as said before, that was merely for a time so short that prescription can

not be based upon it. The indiscriminate use of an open lot by pedestrians, who may go across it in any direction they may see fit, is hardly a use calculated to impress the owner with the belief that it was intended to be adverse.

Appellant's seventh assignment of error complains of the action of the trial court in refusing to permit plaintiffs to offer testimony of the witness H. M. Metz relating to the transaction between F. W. Sutor on the one hand, and Erwin Eggleston and others representing the defendant railroad company on the other, at the time of the sale of lot No. 1, block 29, by said Sutors to the railroad. The general purpose of this testimony was to establish the fact that, during the negotiations of the purchase of lot No. 1 by Eggleston, the agent of the Railroad Company, it was understood and so represented by Eggleston that lot No. 1 was to be left open and to be only used for railroad purposes. And the further effect sought to be given to the testimony of this witness is that this agreement constituted a part of the consideration that influenced the Sutors to sell the lot. The deed in question contains no recital of this fact. It vests in the International & Great Northern Railroad Company, for a valuable consideration, the fee simple title to the property. It imposes no qualification or limitation upon the right of the owner to enjoy and use the property in any way beneficial to it. The purpose of this evidence would be to restrict the right of use and deprive the owner of one of the beneficial enjoyments that goes with the title as one of its necessary incidents, unless qualified and limited in the instrument itself. It is something more than proving an additional consideration; it is limiting and qualifying the legal estate granted, and we are not able to recognize that this is one of the instances in which it is permissible to prove merely an additional consideration other than that recited in the conveyance.

There is no merit in the eighth assignment of error. The trial court correctly excluded the ordinance offered in evidence by the appellants. Its vitality was dependent upon the fact that its terms should be accepted by the railroad company. There is no evidence, neither was any offered, to show that the railroad company had accepted the ordinance.

The ninth assignment of error complains of the action of the trial court in sustaining appellees' special exception No. 5 addressed to a certain count in the petition. If this issue presented by this count in the petition could be considered as in the case, it could properly be held as disposed of by what we have said in reference to the admissibility of the testimony of the witness Metz. But it appears that the assignment of error in question is not in the transcript. It is only presented for the first time in the brief of appellants. Its consideration is objected to by the appellees on that account. The question raised by the pleading does not, in our opinion, present a fundamental error.

For the reasons stated, we find no error in the record, and the judgment is affirmed.

Affirmed.

Writ of error refused.

T. J. FREEMAN, RECEIVER INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY, v. W. K. TAYLOR.

Decided February 2, 1910.

1.—Evidence—Opinion—Probable Conduct.

The probability of a person acting in a certain way under given circumstances is not a question on which opinion evidence is receivable.

2.—Same—Case Stated—Contributory Negligence.

A servant employed about a pile driver was killed by the descending hammer slipping past the head of the pile, which had got out of line, and striking a stick with which he was trying to push the pile back into place. Issue being raised as to his contributory negligence in using the stick for such purpose in a certain manner after being warned of the danger in so doing, it was improper to permit a witness to give his opinion as to the probability of deceased so doing after receiving such warning.

Appeal from the District Court of Robertson County. Tried below before Hon. J. C. Scott.

King & Morris and *Doremus & Butler,* for appellant.—The objection of the defendant to the question covered by bill of exceptions should have been sustained on the ground that it called for a conclusion of the witness as to matters exclusively and peculiarly for the jury. DeWalt v. Houston & E. T. Ry. Co., 22 Texas Civ. App., 403; Wells-Fargo Exp. Co. v. Boyle, 39 Texas Civ. App., 365; Kansas, G. S. L. Ry. Co. v. Scott, 1 Texas Civ. App., 1.

Where the evidence shows that the labor being performed by the servants for the master was done in the usual and customary way, and an injury results therefrom, the law assumes the injury to be the result of a risk incident to the work and not due to negligence, and under such state of facts it is error for the court to submit the question of negligence to the jury, but as a matter of law the court should have held there was no negligence and directed a verdict for defendant. Houston & T. C. Ry. Co. v. Tierney, 72 Texas, 315; Texas & P. Ry. Co. v. Hightower, 12 Texas Civ. App., 41; Houston & T. C. Ry. Co. v. Gilmore, 62 Texas, 391; Galveston, H. & S. A. Ry. Co. v. Faber, 63 Texas, 344; Texas & P. Ry. Co. v. McCoy, 90 Texas, 264; Atchison, T. & S. F. Ry. Co. v. Click, 5 Texas Civ. App., 224.

Where the master has specifically warned and cautioned the servant how he should conduct himself in the performance of his work, and nevertheless he is injured, the master has done all that is required of him in law, and the plaintiff can not recover. Houston & T. C. R. Co. v. Pollock, 115 S. W., 846, 847; 1 Labatt, 948, secs. 55, 235, 246, 394; Ft. Worth & R. G. Ry. Co. v. Robinson, 37 Texas Civ. App., 465; International & G. N. R. Co. v. Royal, 37 Texas Civ. App., 261; Hightower v. Gray, 36 Texas Civ. App., 674.

When the uncontroverted evidence shows that the person was guilty of contributory negligence and such contributory negligence was the direct and proximate cause of the injury, it is the duty of the court to direct a verdict for the defendant. Sanchez v. San Antonio & A. P. Ry. Co., 88 Texas, 120; Galveston, H. & S. A. Ry. Co. v. Ryon,

80 Texas, 60-61; Crawford v. Houston & T. C. R. Co., 89 Texas, 92; Flores v. Atchison, T. & S. F. Ry. Co., 24 Texas Civ. App., 328; Ft. Worth & R. G. Ry. Co. v. Robinson, 37 Texas Civ. App., 465; International & G. N. R. Co. v. Royal, 37 Texas Civ. App., 261; Hightower v. Gray, 36 Texas Civ. App., 674.

The evidence further shows most conclusively that the verdict and judgment is against the weight and preponderance of the evidence in this, that it most conclusively fails to show any negligence or any fact wherein the defendant was negligent in causing the injury resulting in the death of Kirk Taylor. Ft. Worth & R. G. Ry. Co. v. Robinson, 37 Texas Civ. App., 465; International & G. N. R. Co. v. Royal, 37 Texas Civ. App., 261; Texas & P. Ry. Co. v. French, 86 Texas, 96; Hightower v. Gray, 36 Texas Civ. App., 674; Galveston, H. & S. A. Ry. Co. v. Lempe, 59 Texas, 22; St. Louis, A. & T. Ry. Co. v. Lemon, 83 Texas, 146; Houston & T. C. Ry. Co. v. Martin, 21 Texas Civ. App., 207; Houston & T. C. Ry. Co. v. Scott, 62 S. W., 1077; St. Louis, S. W. Ry. Co. v. Shiflet, 94 Texas, 131; Crawford v. Houston & T. C. Ry. Co., 89 Texas, 89.

Scott Field, Bailey & Morehead and *Woods & Graham,* for appellee, cited: Gulf, C. & S. F. Ry. Co. v. Brentford, 79 Texas, 619; International & G. N. Ry. Co. v. Garcia, 54 Texas Civ. App., 59; Missouri, V. B. & I. Co. v. Ballard, 53 Texas Civ. App., 110; Texas & P. Ry. Co. v. Tuck, 116 S. W., 622; Gulf, C. & S. F. Ry. Co. v. Jackson, 49 Texas Civ. App., 573; Texas & N. O. Ry. Co. v. Jackson, 51 Texas Civ. App., 646; McCray v. Galveston, H. & S. A. Ry. Co., 89 Texas, 168; Texas & N. O. Ry. Co. v. Crowder, 63 Texas, 504; Trinity County L. Co. v. Denham, 85 Texas, 56; Broadway v. San Antonio Gas Co., 24 Texas Civ. App., 603.

RICE, ASSOCIATE JUSTICE.—On the 6th of April, 1909, Kirk Taylor, while engaged with other employes of appellant repairing a bridge on its line of railway, received injuries in operating a pile driver, which resulted in his death, and this suit is brought by appellee, his father, for the benefit of himself and his wife, the mother of said Kirk Taylor, to recover damages therefor.

It was alleged that the employment of said Kirk Taylor required him to perform the duties of "lead man," together with one Bunk Crabtree; that a part of their duties was to assist in guiding the piles between the leads—two upright pieces of timber between which the hammer operated; that in the performance of this work he was directed by Alford, the vice-principal, to use and was using a "lead stick," which was a round stick about five and one-half feet long; that in the performance of this duty he was required to stand underneath the platform or deck of the piledriver, which being just above his head obstructed his view of the hammer, the top of the pile then being driven, as well as the signal man, who stood on said platform; that the piles were being driven by means of a large hammer, weighing some 2000 or 3000 pounds, which was raised by rope cables to a height of some thirty feet above the top of the piles placed between the "leads;" that the cables were operated by an engine in charge of

another employe known as the "hammer man," and that said "hammer man" applied the force which raised and lowered the hammer in accordance with signals given by the "signal man;" that this work was being done under the direction of one Alford, who was vice-principal, with authority to direct appellant and the other workmen in the performance of their duties; that while said Kirk Taylor was standing underneath the platform in readiness for the performance of his duties as such "lead man" one of the crew called the attention of said Alford to the fact that the pile then about to be driven was out of line. It was alleged that it was dangerous to strike the pile when out of line, and that said Alford, with the knowledge that the same was out of line, negligently directed the said pile to be struck with the hammer; that when the hammer fell it struck the piling a glancing blow, slipped past the head of the pile about two feet, forcing the same suddenly and with great violence further out of line, and against the hand-stick then being held by said Kirk Taylor, catching it between the leads, forcing the same suddenly around with great swiftness, whereby the same was caused to strike said Kirk Taylor under the jaw, breaking the same and driving his head violently against the bottom of the platform or deck, upon which he was standing, from which projected a tap or nut that entered his skull, crushing the same, resulting in his death.

Appellant replied by pleading the general issue, contributory negligence and assumed risk. There was a verdict and judgment for the plaintiff, from which this appeal is prosecuted.

Appellant's principal contention in the court below was that Kirk Taylor was guilty of contributory negligence in placing his head over the "lead stick," but for which he would not have been injured, and that he had been frequently warned, both by Alford and Crabtree, to keep his head from over the "lead stick."

During the trial after Crabtree, a witness for appellant, had testified that he had warned Taylor a time or two that morning to look out for the stick and not to keep his head over the same, and that Alford had also warned him, he was asked on cross-eaxmination by appellee, as shown from the bill of exceptions, the following question: "Is it likely, after being so frequently warned, that Taylor would have put his head over the stick?" To which question and the answer sought to be elicited thereby, appellant objected on the ground that said question called for the conclusion of the witness, but the court overruled said objection and permitted the witness to answer, whereupon the witness said: "It didn't look so."

This ruling is complained of by the third assignment. We think the objection should have been sustained and this testimony excluded. It was permitting the witness to give his conclusion or opinion as to what Taylor would probably have done in the event that he had been so warned. We do not think this is a matter about which opinion or expert evidence can be offered. It seems to us that the jury were as capable of saying what Taylor would likely have done in the face of such warning as the witness was. It at best was a mere matter of conjecture, and it permitted the witness to give his opinion upon

one of the salient features of the case, which was then being stressed by the defense, and therefore calculated to prejudice the rights of appellant. The assignment complaining of this ruling, in our judgment ought to be sustained. See DeWalt v. Houston, E. & W. T. Ry. Co., 22 Texas Civ. App., 403, 55 S. W., 537; Kansas, G. S. S. Ry. Co. v. Scott, 1 Texas Civ. App., 1, 20 S. W., 725-6; Clardy v. Callicoate, 24 Texas, 172.

We have carefully considered the other errors assigned, challenging the correctness of the charge of the court, as well as its failure to give several special charges requested by appellant, none of which we think are well taken. The charge, in our judgment, clearly presents the law of the case as made by the evidence, and is not subject to the objection urged against it, and the special charges, where correct, were covered by the main charge, so that their refusal was not error. For obvious reasons it is unnecessary to discuss those assignments questioning the sufficiency of the evidence to support the verdict, but for the error heretofore pointed out the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY ET AL. v. F. W. CLARK.

Decided February 2, 1910.

1.—Assumed Risk—Knowledge and Complaint of Defect.

The servant does not assume the risk of defect in the appliances of the business (absence of lock on a railway switch) by knowledge of and failure to report such defect, when it is also known to the master or his employee charged with the duty of repair.

2.—Same—Continuing in Service.

The servant of a railway company does not assume the risk of injury from a defect in the machinery known to him, by continuing in his employment with such knowledge, unless such course involved a lack of ordinary care on his part. (Act of April 24, 1905, Laws 29th Leg., p. 386.)

3.—Damages—Personal Injury.

A recovery of $7,500 sustained as not excessive in case of painful and permanent injuries to a brakeman, a young man earning $100 per month and in line for promotion.

Appeal from the District Court of McLennan County. Tried below before Hon. Marshall Surratt.

King & Morris and *Baker & Baker,* for appellant.

J. E. Yantis, for appellee.

KEY, ASSOCIATE JUSTICE.—This is a personal injury suit, which resulted in a verdict and judgment for the plaintiff for $7500, and the defendant has appealed.

The negligence charged against the defendant was the failure to

keep a certain switchstand locked, thereby causing the derailment of an engine, which fell upon and injured the plaintiff.

The defendant answered by general demurrer, general denial and a special plea of assumed risk and contributory negligence.

The first assignment of error complains of the action of the trial court in giving the jury the following instruction:

"You are instructed that where a personal injury is sustained by an employe of a railroad corporation and such injury is caused by the negligence of such corporation, the plea of assumed risk of such employe shall not be available as a defense by such corporation when the ground of the plea of assumed risk is knowledge or means of knowledge of the defect, if any, which caused the injury, provided the employe's employer or the employe's superior intrusted by the employer with the authority to remedy or cause to be remedied the defect, if any, knows of such defect and in such cases the employe complaining of the injury, if any, is not required to report the defect, if any, to his employer or such superior."

This charge stated the law correctly, and there was testimony which justified the court in submitting the issue to the jury.

The second assignment complains of the following paragraph of the court's charge:

"On the contrary, if the defendant or its employes intrusted with authority to remedy or cause to be remedied the failure to put a lock on said switch did not know of the absence of a lock thereon at the time plaintiff was injured, and you believe from the evidence that the plaintiff Clark had an opportunity before being injured to inform the defendant, or such employe who is intrusted with authority to remedy or cause to be remedied the failure to put a lock on said switch stand that said switch stand had no lock thereon, and failed to do so, and that such failure on his part was negligence; and you further believe from the evidence that a person of ordinary care in the exercise of ordinary care for his own safety, under the same or similar circumstances, with the knowledge of the absence of a lock on said switch stand, and the danger, if any, incident thereto, would not have continued thereafter in the service of defendant's company, then you will find for the defendant; or if you believe from the evidence that a person of ordinary care in the exercise of ordinary care for his own safety under the same or similar circumstances as plaintiff was situated would not have continued in the service of defendant's company, in the absence of a lock on said switch stand after the discovery of such absence, then if you so find you will find for the defendant; or if you believe from the evidence that the accident and the injury of which the plaintiff complains was the result of some cause or causes other than the fact that there was no lock on the switch stand, and that such cause or causes, if any, were unknown to the defendant and you believe that the defendant could not, by the use of that care which a person of ordinary care, engaged in a similar business would have exercised under the same or similar circumstances have discovered such cause or causes, then such failure to discover such other cause, if any, would not be negligence upon the part of defendant company."

The law of assumed risk by railroad employes is modified by an Act of the Twenty-Ninth Legislature, and the charge here complained of is a proper presentation of the doctrine of assumed risk as thus modified, and no error was committed in giving that instruction.

The third assignment assails the verdict of the jury upon the proposition that the testimony showed that the plaintiff knew that there was no lock on the switch, as well as the danger, and continued in the service of the defendant without giving notice of the absence of the lock. There was testimony sufficient to show that the defendant had notice from other sources of the absence of the lock, and therefore it was not incumbent upon the plaintiff to give such notice, and he was not required to quit the defendant's service unless a person of ordinary prudence would have done so.

The fourth and last assignment presents the contention that the verdict is excessive. The plaintiff was a young man, was a trained brakeman, and at the time he was injured was earning $100 per month, and was in line for promotion. He was on the engine, acting as brakeman when it was derailed. The engine fell upon him and pinioned one of his legs to the ground, thereby causing a very serious injury, concerning which there was testimony tending to show that it would be permanent. He was badly scalded by escaping steam and suffered much and long continued physical pain. It is not considered necessary to set out or summarize all the testimony bearing on the question; and we content ourselves with the statement that the testimony was such as that it would not be proper for this court to hold that the amount of damages awarded are so disproportionate to the injuries sustained as to lead to the conclusion that the jury was actuated by some improper motive.

No reversible error has been shown and the judgment is affirmed.

Affirmed.

GEORGE W. CLEMMER v. LUCILLIUS PRICE ET AL.

Decided February 2, 1910.

1.—Contract—Minority—Disaffirmance.

Contracts by minors are not void because of nonage but voidable merely; and such contracts as are made for the reasonable value of necessaries and in pursuance of statutory authority are binding. Some voidable contracts of a minor bind him unless he disaffirms them, while others do not bind him unless he ratifies them. Such voidable contracts as are wholly or partially executed need no ratification but are binding until disaffirmed. This principle applies when an interest in property of a fixed and permanent nature is vested in the minor or other party under an executed contract, as by a conveyance of real estate. In such case there must be a distinct act of disaffirmance on the part of the minor, and that within a reasonable time after attaining majority; what is a reasonable time is a question of fact.

2.—Same—Case Stated.

A minor purchased a tract of land paying part cash and executing his promissory notes for the balance, the notes being secured by express lien; the notes matured about six months after the minor came of age and suit was soon thereafter filed upon them; the minor answered setting up his minority at the time the contract of purchase was made, and prayed that the

contract be cancelled and that he have judgment in reconvention for the cash payment. Held, that the minor did not disaffirm the contract in a reasonable time and was liable on the notes.

Appeal from the District Court of Bexar County. Tried below before Hon. J. L. Camp.

Leonard Brown and *W. P. Finley,* for appellant.—The transaction involved herein, including money paid and notes executed, such transaction occurring between the appellees and appellant during the latter's minority, was voidable at the appellant's election, and the appellant had the right to disaffirm it, and to be relieved from its consequences. Thus he was entitled to recover back the money paid during his minority, and to have the notes canceled. Rapid Transit Land Co. v. Sanford, 24 S. W., 587; Craig v. Van Bebber, 13 S. W., 906; Hegler v. Faulkner, 153 U. S., 111; Blankenship v. Stout, 25 Ill., 132; Keil v. Healey, 25 Am. Rep., 436.

In view of the facts and circumstances of this case, the appellant disaffirmed the said transaction involved herein within a reasonable time after reaching his majority. The appellant is, accordingly, entitled to recover back the money paid during his minority and to have the notes canceled. Stone v. Wolfe, 50 Texas Civ. App., 231; Craig v. Van Bebber, 13 S. W., 906; Cardwell v. Rogers, 76 Texas, 37; Magee v. Welsh, 18 Cal., 156; Cole v. Pennoyer, 14 Ill., 158; Weeks v. Wilkins, 134 N. C., 516; O'Dell v. Rogers, 44 Wis., 136; Scranton v. Stewart, 52 Ind., 68; Doe v. Abernathy, 7 Blackford (Ind.), 442.

Where the infant has made no representations as to his age, the mere fact that the person with whom he was dealing believed him to be of age even though his belief was warranted by the infant's appearance and the surrounding circumstances, even though the infant knew of such belief, would not render a contract valid or estop the infant from an exercise of his right to disaffirm. 22 Cyc. Law and Proc., 611; Sewell v. Sewell, 18 S. W., 162; Rivers v. Gregg, 5 Rich. Eq., 274-279; Carpenter v. Pridgen, 40 Texas, 32; Peck v. Cain, 27 Texas Civ. App., 38.

The plea of purchase in good faith, for value and without notice, is not availing as against the minor's right of disaffirmance. McMorris v. Webb, 43 Am. Rep., 629; Mustard v. Wohlford's Heirs, 76 Am. Dec., 209.

An infant is not estopped from avoiding his contract from the fact that he did not disclose his minority at the time he entered into the contract, and from the further fact that the other party believed him to be an adult. It is clear that such facts would not estop him from avoiding the notes and from recovering the cash paid. Baker v. Stone, 136 Mass., 405; Carpenter v. Pridgen, 40 Texas, 32.

C. C. Clamp and *Seth S. Searcy,* for appellees.

NEILL, ASSOCIATE JUSTICE.—The appellees, Lucillius Price, J. E. Ritchey and Joel Buttles, on April 7, 1908, brought this suit against Geo. W. Clemmer to recover on certain promissory notes, Nos. 1, 2 and 5, of a series of five promissory notes executed by defendant to

plaintiffs on January 22, 1907, and to foreclose an express vendor's lien upon a certain tract of land for which the five notes were given for a part of the purchase money. The plaintiffs also alleged that B. F. Witte was the owner of notes Nos. 3 and 4, and asked that he be made a party defendant for the purpose of adjudicating such matters pertaining to his notes and the respective liens on the land for which they were given as might be necessary. The notes will be more fully described in our conclusions of fact.

The defendant Clemmer, on May 10, 1909, filed his first amended original answer, which consisted of a general denial, and special plea in which he admitted that he executed the series of notes described in plaintiff's petition in part payment for the tract of 193.28 acres of land upon which the foreclosure of the vendor's lien was sought. He then alleged that in addition to the notes he paid plaintiffs at the time the notes were made the sum of $800 cash for the tract of land; that when he made the notes and paid said sum he was a minor, being twenty years old, reaching his majority on July 14, 1907; that "now (the date of filing his amended original answer) having attained his majority, being over the age of twenty-one years, he elects to rescind and disaffirm said contract of purchase entered into between himself and plaintiffs, as evidenced by said deed and notes, and tenders to plaintiffs a deed reconveying said lands to them; that by reason of the payment by him to plaintiffs of said sum of $800 while a minor, and the rescission of said contracts and notes and tender to plaintiffs of said deed, or upon notice to them of his intention to disaffirm said contract and notes, plaintiffs become bound and liable to pay him said sum of $800, together with interest thereon from January 22, 1907, at the rate of six percent per annum," for which amount he asked judgment against them, and that a lien be decreed in his favor for said sum on the land and for a foreclosure thereof.

Defendant further pleaded, in the alternative, that at the time the conveyance was made, the notes executed and money paid by him, the plaintiffs fraudulently represented to him that said land was twelve miles from Millett, Texas, the nearest railway station, and that water for drinking purposes could be obtained at a depth of twenty-six feet; that such representations were false, said land being eighteen miles from Millett, and suitable water for drinking purposes not obtainable at such depth; that such representations were made for the purpose of inducing defendant to purchase said land; that defendant relied upon such representations and purchased the land believing them to be true, and that had they not been made to him he would not have made the purchase; wherefore he asked judgment for a rescission of the contract of sale, for the eight hundred dollars paid, and a cancellation of the notes sued on.

The defendant B. E. Witte appeared and, after demurring to Clemmer's answer, filed a general denial, and pleaded that he was the owner and holder of notes Nos. 3 and 4 of the series and asked judgment for the amount due thereon and a foreclosure of his lien upon the land for which they were given.

The case was tried by the court without a jury and judgment was

rendered in favor of plaintiffs against the defendant for the principal, interest and attorney's fees, amounting in the aggregate to $1150, due on the three notes held by them, and also in favor of B. E. Witte against him for the principal, interest and attorney's fees, amounting in the aggregate to $697.25, due on the two notes held by the said Witte, together with a foreclosure in favor of plaintiffs and Witte of the express vendor's lien on the land for which the notes were given. This appeal is from said judgment.

We adopt so much of the trial court's conclusions of fact as are essential to a decision of the case, which are as follows:

"(1) That plaintiffs Lucillius Price, J. E. Ritchey and Joel Buttles on or about the 22d day of January, A. D. 1907, sold to the defendant, George W. Clemmer, 193.28 acres of land out of survey No. 6, block No. 5, certificate No. 2683, patented to the I. & G. N. R. R. Co., being patent No. 63, volume 112, being part of the said original survey, said original patent containing 422 acres, being all that part of said original survey lying south of the new county road from Carrizo Springs to Millett, and that as a part consideration for the payment of said land, the said defendant, George W. Clemmer, executed to the said named plaintiffs his five several promissory notes each for the sum of $320, even date with said deed, due on or before one, two, three, four and five years after date respectively, payable to the order of said plaintiffs at the Frost National Bank in the city of San Antonio, Bexar County, Texas, with seven percent interest per annum, interest payable annually; each of said notes providing that failure to pay any note or any installment of interest thereon when due, shall, at the option of the holder of them or any of them, mature all of said notes, and providing and stipulating for ten percent attorney's fees on the amount of principal and interest owing if said notes are placed in the hands of an attorney for collection or collected by suit. That the deed to said above described property was properly executed and acknowledged by said plaintiff and delivered to said defendant, and that said notes were signed by said defendant and delivered to said plaintiffs; that said defendant took possession of said land. (2) That said defendant, George W. Clemmer, at the time he purchased said land from said plaintiffs was a minor under the age of twenty-one years, and did not reach his majority until the 14th day of July, A. D. 1907, and that on the 23d day of January, 1907, at the time he purchased said property, he was twenty years, six months and nine days old. (3) That the defendant, George W. Clemmer, first came to LaSalle County in the State of Texas, in the month of December, 1906, prior to his purchase of said property, and that he remained there and ran a hotel at Bookwalter for about three months for Price, Ritchey and Buttles, plaintiffs in said cause; that he went over the land that he purchased several times, rode over it on horseback and went over it in a wagon at different times and started to clear a place on said land and discussed with a contractor about building a house on said land and clearing the same. (4) That plaintiffs sold said land to said defendant, George W. Clemmer, without any knowledge, actual or constructive, of his minority, and acted in perfect good faith, and that the price contracted to be paid for

said land was a reasonable price therefor. (5) That the first of said series of notes matured January 23, 1908, and that at that time the said George W. Clemmer had left Texas and returned to his former home and that his whereabouts at said time were unknown to plaintiffs; that said first note was not paid at its maturity, or any provision made for its payment by the said defendant, George W. Clemmer, nor were his whereabouts disclosed to plaintiffs. (6) That said defendant did not acquaint plaintiff with the fact that he was a minor at the time he purchased said land until after said note had matured and said suit had been brought, when he set up his minority as a defense to the recovery on said notes, and filed a cross-action asking for the return of the cash paid by him when he purchased the said land in January, 1907. (7) That said defendant took no steps to disaffirm said contract until after the first note of said series had matured and until said suit had been filed and did not disaffirm said trade within a reasonable time."

Conclusions of law.—In our view of the case, we deem it wholly unnecessary for us to discuss the numerous assignments of error insisted upon by the appellant. Suffice to say that, in our opinion, none of them, material to a proper decision of the case, is well taken.

An infant's contracts are not void because of his nonage, but all are voidable merely, with the exception of his contracts for the reasonable value of necessaries and his contracts made in pursuance of statutory authority, which are binding. Some voidable contracts of an infant bind him unless he disaffirms them, while others do not bind him unless he ratifies them. Voidable contracts of an infant, which are wholly or partially executed, need no ratification, but are binding until disaffirmed. This principle applies when an interest in property of a fixed and permanent nature is vested either in the infant or other party to the contract under an executed contract, as by a conveyance of real estate. In such a case there must be a distinct act of disaffirmance on the part of the infant to avoid the contract. Such a contract must be disaffirmed within a reasonable time after the infant attains his majority; and what is a reasonable time is a question of fact for the jury. Simpkins v. Scarcy, 10 Texas Civ. App., 406, 32 S. W., 849. The defendant Clemmer not having disaffirmed the contract within a reasonable time after attaining his majority, was bound by it and liable upon the notes sued on. Therefore the judgment is affirmed.

Affirmed.

Writ of error refused.

JOHN STRONG v. H. T. ELDER & SONS.

Decided February 3, 1910.

1.—Homestead—Surviving Husband—Attachment Lien.

Where the surviving husband, there being no children, is no longer the head of a family, although entitled to occupy the homestead, it is protected from forced sale, even subject to his homestead rights; and this protection extends to and forbids sale under foreclosure of the lien of an attachment against him as well as sale under execution.

2.—Same.

The levy of an attachment writ is a step in the course of securing a forced sale, and does not create a lien which might be enforced against the homestead.

3.—Same—Contract Lien Distinguished.

The fact that the claimant of homestead rights, a husband without children after the death of the wife, has the right to sell or mortgage it, and that such mortgage lien may be enforced subject to his homestead rights, presents a different case from that of sale under execution or attachment lien. Harle v. Richards, 78 Texas, 80 distinguished.

Appeal from the District Court of Gregg County. Tried below before Hon. W. C. Buford.

Lacy & Bramlette, for appellant.—An attachment lien attempted to be placed on a homestead is void, and being void, is not subject to foreclosure. Willis v. Matthews, 46 Texas, 479; Boring v. Cain, 65 Texas, 75; Willis v. Mike, 76 Texas, 82; Mayers v. Paxton, 78 Texas, 196; Tobar v. Losano, 6 Texas Civ. App., 698; McNeil v. Moore, 7 Texas Civ. App., 536; Morrison v. Carnahan, 31 S. W., 436; Glascock v. Stringer, 32 S. W., 920, 33 S. W., 678; Woeltz v. Woeltz, 57 S. W., 905.

Surviving husband may retain homestead existing as such at the time of his wife's death, even though he has no children and no constituent members of a family, and same is not subject to forced sale. Kessler v. Draub, 52 Texas, 575; Blum v. Gaines, 57 Texas, 119; Schneider v. Bray, 59 Texas, 670; Watkins v. Davis, 61 Texas, 414.

F. B. Martin, for appellees.—Harle v. Richards, 78 Texas, 80, virtually and in fact changes the rule as laid down in cases of Blum v. Gaines, 57 Texas, 119; Kessler v. Draub, 52 Texas, 575, and other cases cited by appellant. The appellant in this case, at the death of his wife, not having any children, ceased to be the head of a family, and thereby became a single man under the law, and entitled to only the exemptions of a single person and the use and occupancy of the homestead for such time as he sees fit to use it as such.

LEVY, ASSOCIATE JUSTICE.—Appellees in their suit for debt caused to be levied a writ of attachment against the eighty acres of land in controversy in this appeal, and prayed for the foreclosure of the attachment lien and the sale of the land thereunder in satisfaction of their debt. Appellant by his answer claimed that the eighty acres so attached was his homestead and as such exempt from forced sale. The trial was before the court without a jury. The court filed his findings of fact, which are fully supported by the record and are not challenged by the parties to this suit. The court made the findings that the eighty acres of land on which the attachment writ was levied was at the time of the levy and trial the homestead of appellant, and that he was in the use and occupancy of the same, and entitled to the use and occupancy of the same, as a homestead; that the land was acquired as and constituted the homestead of appellant and his wife, and that after the death of his wife, which occurred

previous to the issuance of the attachment lien, the appellant continued to remain on and use and occupy the premises as a homestead the same as during his wife's lifetime, and has never abandoned his use and occupancy of the same as a homestead. The appellant and his wife, as the court finds, had no children, and after the death of his wife appellant continued to remain upon the homestead alone. The debt sued on was not for the purchase money for the premises, nor for work and material used in constructing improvements on the premises. The court concluded as a matter of law that though the premises were the homestead of appellant and he was entitled to the use and occupancy of the same as a homestead, yet as appellant was not the head of a family a lien could be created by attachment against the premises subject to the use and occupancy of same by appellant. The judgment entered in the case was that the attachment lien be foreclosed against the premises subject to the homestead right of appellant therein, and that no process to sell the premises issue as long as appellant continues to use and occupy the same as a homestead, and that process to sell same may issue when the "homestead rights of defendant cease to exist."

The specifications of error, by proper assignments, challenge the ruling of the court upon the ground that the premises, being the homestead of appellant, were exempt and protected from forced sale, and were not subject to attachment liens. The contention of appellant must be sustained. It is a well settled law of this State that when a homestead has once been acquired, as in the instant case, the subsequent death of either the husband or wife does not subject the homestead to forced sale under a judgment for ordinary debt, as in this case, the survivor still occupying and continuing it as a homestead. Blum v. Gaines, 57 Texas, 119; also Taylor v. Boulware, 17 Texas, 77; Kressler v. Draub, 52 Texas, 574; Schneider v. Bray, 59 Texas, 668; Childers v. Henderson, 76 Texas, 667, 13 S. W., 481. See sections 50 and 52 of article 16, Constitution of Texas. In explaining the rulings in these cases the Supreme Court, in answering a certified question in the case of Bahn v. Starcke, 89 Texas, 203, 34 S. W., 103, uses this language: "They, however, settle the law upon the point decided, and we are not disposed to cavil at the conclusions there announced."

The levy of an attachment writ is a step in the course of securing a forced sale, and does not create a lien which might be enforced against the homestead. Willis v. Mike, 76 Texas, 82, 13 S. W., 58. The principle of the decisions, based on the terms of the Constitution, is that the homestead, being expressly exempted and protected from forced sale, no statutory lien leading to a sale is ever valid against the homestead. Glasscock v. Stringer, 32 S. W., 920, and many other cases of like import.

Appellees cite the case of Harle v. Richards, 78 Texas, 80, 14 S. W., 257, and contend that the ruling in this case virtually changes the rule laid down in the case of Blum v. Gaines, supra. We do not think so. The question there and the question in the instant case are entirely dissimilar. The Constitution does not make void the contract lien created by the survivor. By the terms of the Constitution it is

only prohibited to a married man while his wife is living, to create a voluntary contract lien on the homestead. Lacy v. Rollins, 74 Texas, 566, 12 S. W., 314. But the Constitution in terms expressly exempts and protects the homestead of the survivor from all forced sales for ordinary debts. This is a sufficient statement to make clear the distinction. The reason of the Harle case is that, as the contract lien was allowable against the premises, it could be foreclosed against the premises subject to the use and occupancy with which it was burdened. In a sense, a mortgage foreclosure is a forced sale, but the difference is that such sale arises as a necessary incident of the voluntary incumbrance, and rests upon voluntary contract of such form of alienation of the land. It is sold in that manner because agreed. But such reason clearly is not allowable in the instant case, of a forced or statutory lien, without in effect nullifying the terms of the Constitution. It is not alone the right of possession and use of the homestead that is exempt and protected to the survivor from forced sale of creditors by the terms of the constitution, but "the homestead," which includes the ownership, as well as possession and occupancy. It follows that the lien on the homestead being void, no forced sale of the premises could occur, and that the judgment of the court in this respect was error.

The judgment of the District Court, in so far as it decrees foreclosure of the attachment lien on the eighty acres in controversy in this case, is reversed and here rendered in favor of appellant with all costs, and the remaining portion of the judgment of the court is affirmed.

The judgment was ordered reversed and rendered in part, and affirmed in part.

Reversed and rendered in part.

Writ of error refused.

E. P. McMICKLE v. J. F. ROCHELLE ET AL.

Decided February 3, 1910.

1.—Taxation—Rendition—Description of Land.

The statutory requirements as to the description of land in listing it for taxation are for the protection of the owner in an attempt of the State or municipality to enforce collection. Where the owner has himself rendered it under a description identifying it and accepted by the taxing officers, the government can not complain of an omission in such requirements.

2.—Same—Lots—Rendition by Acreage—Case Stated.

The owner of a tract of land adjoining a city laid it off in blocks and lots and the city limits were extended to include it. Having sold off part of the lots, he rendered and valued the unsold portion, by acreage, as a part of the original survey, not designating it by lot and block, and this was accepted without objection by the assessor and board of equalization, and the taxes so assessed paid by the owner. A succeeding assessor, finding the lots unrendered under their description as such, placed them on the unrendered list and assessed taxes against the "unknown owner," and in suits against the unknown owners the lien was foreclosed and sale ordered, all without the knowledge of the owner. Held that the first rendition, assessment, and pay-

ment by the owner were valid as against the city and sale of the lots under the judgment against unknown owners should be enjoined.

3.—Same—Double Assessment—Injunction.

Under Article 52,321, Revised Statutes, the owner may enjoin a sale of lands for taxes where the tax has been paid by him under a different assessment. The District Court was, it seems, without authority to decree foreclosure of the tax lien of a double assessment in such case. But, if its judgment be held not void but voidable, the proceeding by injunction was a direct attack on it, and maintainable.

Appeal from the District Court of Bowie County. Tried below before Hon. P. A. Turner.

Smelser & Vaughan, for appellant.—Where the owner of property is known or can be ascertained by the use of the diligence required by the statute, a judgment against "unknown owners" rendered on service by publication is void. Wren v. Scales, 103 Texas, 304.

Rodgers & Dorough, for appellees.—The court having found, as a matter of fact, that the city, acting through its officers, pursued the legal path leading up to the judgment assailed, the injunction granted was properly dissolved. Hollywood v. Wellhausen, 28 Texas Civ. App., 540; Gibbs v. Scales, 54 Texas Civ. App., 96.

HODGES, ASSOCIATE JUSTICE.—The appellant is the owner of a number of lots situated in what is called the Highland Park Addition to the city of Texarkana, Texas. These lots are a part of an original tract of 45 or 50 acres forming a portion of the William Jenks survey owned by the appellant since sometime prior to 1888. During that year this tract of land was laid off by appellant into blocks and lots. It was then outside of the corporate limits of the city of Texarkana, but in 1894 the city limits were extended so as to include it. On the first day of January, 1907, all of the lots had been sold except about 63. These were listed by the appellant with the assessor of the city for taxation for that year as 15 acres of the William Jenks survey, valued at $3,000. The rendition was accepted by the assessor without objection, and none was made to the valuation or the assessment by the board of equalization. In April, 1907, the term of the assessor to whom the property had been rendered expired and another was elected to the position. The latter, upon looking over his books, found that 45 of the appellant's lots situated upon the land above referred to did not appear to have been rendered for taxation, and he assessed them as unrendered property against unknown owners. Appellant knew nothing of this latter assessment, and at the proper time paid his taxes under the assessment originally made. No taxes having been paid under the second assessment against the unknown owners, the lots were placed upon the delinquent list. During the following year forty-five suits were filed by the city for the collection of taxes claimed to be due from forty-five of the lots. The suits were brought against the unknown owners, citations were issued and published as required by law in such cases, and in December, 1908, judgments in all of them were rendered in favor of the city for the taxes claimed. Orders of sale were issued and placed in the hands of

the appellee J. F. Rochelle, the sheriff of Bowie County, who proceeded to advertise the property for sale. Appellant knew nothing of these suits till after the judgments were rendered and the lots were advertised. Shortly after ascertaining these facts he instituted this suit, asking that the sales be enjoined and the judgments mentioned be set aside. A temporary restraining order was granted upon the presentation of the petition, but on final hearing this was dissolved and the injunction asked for refused.

The testimony shows that the appellant had sold off a number of lots after the land had been platted, and it does not appear whether those remaining were contiguous to one another or not. Upon one or two of the lots above referred to the appellant had his residence. The record does not contain any of the judgments by virtue of which the sales here sought to be enjoined were to be made, but it will be assumed that they were in accordance with the requirements prescribed for suits against unknown owners and for a foreclosure of tax liens.

The judgment of the court below refusing the injunction was probably based upon the assumption that the first assessment by which the property was listed for taxation as 15 acres of the Jenks survey was void, and did not constitute a rendition sufficient to authorize the payment of the taxes upon that property for that year.

If the assessment was a sufficient compliance with the law governing the rendition of property for taxation, to justify the city tax collector in accepting the sum tendered as the amount due for taxes upon that land according to the valuation then put upon it, the subsequent assessment by his successor against the unknown owners was an erroneous or double assessment. It appears as undisputed that the 15 acres referred to in the first assessment is the same land described as the lots upon which the suits were filed and judgments obtained. Nor is there any dispute of the fact that the appellant paid all of the taxes due the city under the first assessment for the year 1907 at the proper time. Article 5076 of the statute requires that in listing real estate for taxation the statement shall truly and distinctly set forth (1) the name of the owner, (2) the abstract number, (3) the number of the survey, (4) the name of the original grantee of the certificate, (5) the number of acres and the value of the land, (6) the number of the lot or lots, the number of the block, and the name of the city or town and the value of the lots. There was no ordinance offered in evidence showing any additional requirements on the part of the city of Texarkana, and we must assume that there were none. The assessment of property is merely intended as a method of listing it with the proper officer in order that it may bear its just proportion of taxation. To this end the statute requires as the three essentials, (1) the name of the owner, if known, (2) the description of the property, and (3) its value. If there was anything lacking to make the first listing of appellant's property a valid assessment, it was in describing it as 15 acres of the Jenks survey, instead of by the block and lot numbers into which it had been subdivided. The purpose of the description in listing for taxation is to designate the property in such manner that it may be identified. This requirement as to subdivisions of a larger tract is mainly for the benefit of the taxpayer.

1 Cooley on Taxation, 736. The rigid observance of the statutory requirements in this respect has only been enforced in suits for the collection of delinquent taxes and in cases where the assessor and not the owner listed the property. Where the owner himself has rendered the property for assessment and given the description, a very different rule obtains. Cooper Gro. Co. v. Waco, 30 Texas Civ. App., 623, 71 S. W., 619; Dallas T. & T. Co. v. Oak Cliff, 8 Texas Civ. App., 217; 27 S. W., 1036; Scollard v. Dallas, 16 Texas Civ. App., 620, 42 S. W., 640; Grace v. City of Bonham, 26 Texas Civ. App., 161, 63 S. W., 158; Moody v. City of Galveston, 21 Texas Civ. App., 16, 50 S. W., 482. This liberality of construction is permitted for the reason that the owner, who is the only person who could complain of a defective description, is himself responsible for that which was given, and could not have been misled by it. The taxing power, the State or municipality, is only interested in seeing that all property subject to taxation has been assessed at a proper valuation and the taxes due thereon paid. When payment is made or tendered, it is wholly immaterial to the State or city how the property may have been described when assessed. The payment of the taxes due upon a rendition in gross, without observing minor subdivisions, would be as complete a discharge of the tax burden as if the assessment had been made with the utmost regard for the statutory requirements. Let us suppose that the appellant had failed to pay the taxes assessed against him upon his rendition of the 15 acres. Could he resist the collection merely because the property had not been described by the lot and block numbers? We think not. It may be true that if the land had been listed by the assessor in that manner, without the knowledge of the owner and without also giving a description by lots and blocks, the assessment might have been assailed as insufficient by the owner in resisting the enforcement of the tax lien. But it would be absurd for the tax collector to refuse payment when tendered, solely because the statutory requirements as to the description in listing had not been strictly followed. The statute requires, in assessing land, that the abstract number and the number of the survey be given. That requirement is just as imperative as that which calls for the lot and block numbers. But can it be contended with any show of reason that the collector would be unauthorized to accept payment of taxes due upon such a defective assessment when tendered, or that, having accepted it and issued his receipt therefor, it would not be a complete discharge of the taxes due upon that property for that year? If such a payment will cancel the obligation for taxes when resting upon that kind of a rendition or assessment, why not in the one here under consideration? We see no important distinction between this case and the hypothetical one referred to. If the city has the right in this instance to disregard the assessment and collection of the taxes for 1907 upon the property in question, and to treat those proceedings as a void and futile attempt to discharge the tax obligation, and can assert the right to again collect the taxes by virtue of the second listing of the property, then we see no reason why it may not with equal propriety re-assess and collect taxes on all property within its limits which has not heretofore been listed in strict compliance with the

statutory requirements, notwithstanding it may still retain possession of the money paid thereon. The assertion of such a right would involve a construction so at variance with every principle of justice, and so clearly opposed to the spirit and intent of the law regulating the assessment and collection of taxes, that its unreasonableness becomes apparent from the mere contemplation of the consequences that might follow.

The facts of this case show that the first rendition was accepted by the assessor of the city with the description given and at the valuation placed upon the land by the appellant. It was the duty of the assessor to inform himself of the location, character and value of the property which he was listing, and it will be assumed that he did this. It was also the duty of the board of equalization of the city, in passing upon the valuations of the property upon the tax rolls, to do the same thing. We must likewise presume that this duty was observed. The fact that the property was rendered as 15 acres did not prevent that body from estimating and fixing its proper value for taxation. The record discloses no complaint as to valuation placed by the appellant. So far as the testimony goes, we may assume that there was no difference between his valuation and that fixed in the last assessment. We think the payment of his taxes for the year 1907 upon the property in question, under the rendition made by him, was a complete discharge of the taxes for that year, and that the property was not again subject to assessment.

In this view of the case we must treat the last as a double assessment. Article 5232-1 of the Revised Civil Statutes provides: "Real estate which may have been rendered for taxes and paid under erroneous description given in assessment rolls, or lands that may have been doubly assessed and taxes paid on one assessment, or lands which may have been assessed and taxes paid thereon in a county other than the one in which they are located, or lands which may have been sold to the State and upon which taxes have been paid, and, through error, not credited in the assessment rolls, shall not be deemed subject to the provisions of this chapter." In the case of Hollywood v. Wollhausen, 28 Texas Civ. App., 540, 68 S. W., 329, decided by the Court of Civil Appeals of the Fourth District, and a writ of error refused by the Supreme Court, it was held that the District Court was without jurisdiction to render a judgment foreclosing a tax lien in cases falling within the terms of the above provisions of the statute. But it is immaterial, so far as the disposition of this case is concerned, whether we regard the judgments here sought to be enjoined as void, or only voidable. This action is not a collateral, but a direct attack upon them. Crawford v. McDonald, 88 Texas, 630, 33 S. W., 327; Dashner v. Wallace, 29 Texas Civ. App., 151, 68 S. W., 309. The appellant having shown that his property had once been assessed and the taxes paid thereon, he was clearly entitled to have the sales enjoined, and the court below should have so held.

The judgment is reversed and here rendered in favor of the appellant.

Reversed and rendered.

A. ZEIGLER v. C. J. GERLACH & BROTHER.

Decided February 4, 1910.

1.—Consignee—Refusal to Pay Draft—Estoppel.

When a consignee, at the time he refuses to pay a draft for the contract price of a shipment of freight, assigns one reason for the refusal, he may be estopped to assign a different reason thereafter when sued for the breach of his contract.

2.—Consignor and Consignee—Breach of Contract—Duty of Consignor.

When the consignee of goods breaches his contract of purchase by a refusal to accept and pay for the goods, it is the duty of the consignor to take charge of the shipment and so handle the same as to occasion the least damage to the consignee.

Appeal from the County Court of Harris County. Tried below before Hon. A. E. Ammerman.

Byers & Byers, for appellant.

Baker, Botts, Parker & Garwood, for appellees.

McMEANS, ASSOCIATE JUSTICE.—Appellees sued the appellant for the contract price of a carload of Irish potatoes alleged to have been purchased by appellant from F. R. Rose, and recovered a judgment.

Appellees alleged that on May 23, 1905, F. R. Rose, of Polk County, contracted to sell to appellant, and appellant agreed to buy, a carload of Irish potatoes at the price of fifty-seven and one-half cents per bushel, free on board the cars at Livingston; that Rose, in accordance with the contract, loaded at Livingston one car of potatoes of 550 bushels of the kind and character contracted for, and had the same shipped out over the Houston, East & West Texas Railway to destination as directed by appellant, who thereby became obligated to pay Rose the sum of $315; that Rose drew his sight draft on the appellant in favor of appellees, C. J. Gerlach & Bro., on May 25, 1905, for $314.31 with exchange; and appellees thereby became the owner and holder of said demand and entitled to receive said sum from appellant, and that appellant's indebtedness to Rose thereby became the property of appellees. They also alleged demand upon and refusal by appellant to pay. The court filed its findings of fact and conclusions of law, which were duly excepted to by appellant.

The second assignment of error is as follows: "The trial court erred in its conclusions of fact filed herein, in finding that, 'pursuant to the instructions of defendant, said car was shipped out consigned to J. A. Zeigler, at Chicago, Ills.'"

We think this assignment should be sustained. It appears from the undisputed evidence that the shipping instructions given by Zeigler to Rose, when he was notified by Rose that the car had been loaded and at the time he agreed to purchase, were to ship to Zeigler at Chicago. Rose testified that Zeigler told him how to route the car and to ship to him or his order, and to draw on him for the price of

the carload, all of which he did, making the draft payable to C. J. Gerlach & Bro.; that just what the shipping instructions were he could not remember at the time of the trial, but that he followed the instructions to the letter. The bill of lading introduced in evidence indisputably shows that the potatoes were not consigned to Zeigler, but were consigned to Rose at Chicago, Ill.—"notify J. A. Zeigler." The bill of lading was attached to the draft, but was not endorsed by Rose, and under the rules of the railway company Zeigler, without a properly endorsed bill of lading, could not have diverted or otherwise controlled the shipment while in transit, nor would the possession thereof have been surrendered to his order upon arrival of the car at Chicago.

The draft, with the unendorsed bill of lading, was not presented to Zeigler for payment until May 27, 1905, and payment was then refused upon the grounds that the car had been overloaded, and that no invoice showing the number of sacks of potatoes or weights accompanied the draft. No objection was then urged that the refusal to pay the draft was because the bill of lading had not been endorsed. It may be that, had such an objection been seasonably made, the bill of lading could have been endorsed by Rose in time for Zeigler to have diverted the shipment before it reached Chicago, or at least to have handled it after it arrived there. There is no testimony in the record to indicate that Rose would have refused to endorse the bill of lading had he been requested by Zeigler to do so, or if his attention had been called to the omission. Zeigler at once notified Rose of his refusal to pay, and Gerlach & Bro. at once took charge of the shipment and had it deflected, using Rose's name in so doing. Just what became of the potatoes—whether they were sold by Gerlach & Bro., and if so, at what price—was not developed by the testimony. Everything necessary to pass the title of the potatoes to Zeigler was done by Rose except to endorse the bill of lading; and should it be shown on another trial that Rose would have done this, had his attention been called to it, in time for Zeigler to have controlled the shipment en route and after it reached Chicago, we do not think Zeigler ought to be heard to complain of the failure to endorse the bill before or at the time it was tendered to him.

As before stated, it appears that when Rose received notice of Zeigler's refusal to take and pay for the potatoes, Gerlach & Bro., who were the owners of the draft drawn by Rose for the purchase price, diverted the shipment in Rose's name and thereafter handled the potatoes. What disposition was made of them, and, if sold, at what price, does not appear from the testimony. This, however, may be developed upon another trial. Whether the title passed to Zeigler at the time of the shipment, or whether he be now estopped to deny that it did, or whether Zeigler only breached his contract to take and pay for the same, it was, in the circumstances of this case, the duty of the seller, after notice of Zeigler's refusal to pay therefor, to handle the shipment, which was shown to be of an extremely perishable nature and then in course of transportation, to the best possible advantage so as to occasion to Zeigler the least damage, and to hold Zeigler only for

the difference in the contract price of the potatoes and the amount realized from the sale of the same.

This disposes of the assignment of error above quoted, as well as appellant's fifth proposition under the eleventh and twelfth assignments, which are sustained. All the other assignments present no reversible error or errors that will not likely occur upon another trial. For the reasons indicated the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY v. THOMAS C. BRYAN.

Decided February 4, 1910.

1.—Railroad—Personal Injuries—Collision with Cars on Side Track—Negligence—Evidence.

In a suit by a locomotive engineer against a railroad company for damages for personal injuries caused by a collision of his engine with cars which were upon a side track but too near the main track for the engine to clear, evidence considered and held sufficient to support a finding by a jury that the cars upon the side track were so manipulated and moved by defendant's employees, notwithstanding they testified to the contrary, as to cause them to run down too near the main track and so bring about the collision; that the acts of said employees on and about said cars were within the scope of their employment; and that the evidence did not raise the issue of the cars having been tampered with by some one not in the defendant's employment.

2.—Same—Contributory Negligence—Imminent Danger—Charge.

Where a locomotive engineer was injured while attempting to leave the cab of his engine in view of an imminent collision, and the issue being whether or not he was guilty of contributory negligence in so doing, the court charged the jury as follows: "In determining the question whether plaintiff was guilty of negligence either in attempting to leave the engine, or in the manner in which he attempted to leave it, or in not remaining in the engine, you will consider what a man of ordinary prudence would have done in view of the danger under the circumstances." Held, not subject to the objection that it was upon the weight of the evidence.

Error from the District Court of Harris County. Tried below before Hon. Norman G. Kittrell.

Baker, Botts, Parker & Garwood and *A. L. Jackson,* for plaintiff in error.

Lovejoy & Parker, for defendant in error.

McMEANS, ASSOCIATE JUSTICE.—Thomas C. Bryan brought this suit against the Houston & Texas Central Railroad Company to recover damages on account of personal injuries sustained by him, and on a trial before a jury recovered a judgment for $26,000, from which defendant has prosecuted this appeal by writ of error.

Plaintiff alleged that while he was in the service of defendant in the capacity of locomotive engineer, and engaged in running a passen-

ger train, his engine came in collision with cars standing on a sidetrack in defendant's yards at Hearne; that said cars were caused to move into close proximity to the main track so as not to be in the clear of the approaching locomotive and passenger train, and that plaintiff as a result of the collision received the injuries for which he sued. Liability is predicated upon the negligence of defendant in the following particulars:

"That said injuries were directly and proximately caused and occasioned by the negligence and carelessness of the defendant, its agents, servants and employes, in this, to wit: That they knew, or by the exercise of ordinary care could and would have known, that said passenger train on which plaintiff was engineer would arrive at Hearne at said time and at or about the time that it did arrive, and that they negligently and carelessly, and without the use of ordinary care and caution, backed, knocked and kicked the cars then and there on said switch track towards the main track, or negligently permitted same to roll back, so that they came in contact and collided with said passenger train as it was moving over said main line, causing the injuries aforesaid.

"That it was the duty of defendant, its agents, servants and employes, to use ordinary care in moving and handling the cars upon said switch track to prevent same from running so close to the main line as to come in contact with the passenger train, as aforesaid; that they negligently failed and omitted to use ordinary care in said respect, and that, had they done so, said injuries would not have occurred."

Defendant answered by general denial and by pleas of assumed risk, unavoidable accident and contributory negligence.

Appellant's first assignment of error complains of the refusal of the court to give to the jury its special charge No. 1, in which it was sought to have the jury instructed that, under the law and undisputed evidence, the plaintiff was not entitled to recover. This charge was correctly refused if there was any testimony which warranted the jury in finding a verdict for the plaintiff. Defendant contends that the evidence shows that the dangerous position of the cars on the sidetrack resulted from causes and agencies beyond the defendant's knowledge and control, and that the casualty could not reasonably have been foreseen by those in charge of the yard and the movement of the cars therein, as likely to ensue from the movement of the cars as actually made by them, and that there was, therefore, no actionable negligence on the part of defendant in the particulars alleged. This contention necessitates a finding by us of conclusions of fact based upon the evidence in the record.

On the night of plaintiff's injury he was on his regular run, operating an engine drawing a passenger train on defendant's railroad. A short distance south of Hearne the speed of the train was reduced to about fifteen miles per hour owing to the existence of a bridge there which defendant required should not be crossed at greater speed. After passing the bridge about one-fourth of a mile, the train, still running at the rate of about fifteen miles per hour, reached the south end of defendant's yards at Hearne. When within some three hundred feet of the switch leading on to what is known as

track No. 1, at the southern end of the yards, plaintiff discovered what appeared to him to be a long string of cars standing on track No. 1, none of which were sufficiently close to the main line, upon which his engine was running, to interfere or collide with his engine or train. The nearest car to him appeared to be about two car lengths north of the switch. When within 100 or 150 feet of the switch some of the southernmost cars on track No. 1 began to move south toward the switch, starting with a bound as if set in motion by a locomotive, and gradually decreasing in speed until they collided with plaintiff's engine. When plaintiff saw the cars were in motion he immediately applied the emergency brake, and did all that he could to stop the train, but, seeing that a collision was unavoidable, and believing that the nearest car would reach a point on the sidetrack where it converged toward the main line, so as to strike the engine cab where he was, and believing that to remain there would be perilous, he, in an endeavor to safeguard himself, attempted to pass through the front door or window of the cab out on the engine running-board. Just at this time the collision occurred, and plaintiff was afterwards found upon the ground about a car length south of the locomotive, grievously hurt. The engine cab was knocked off by the force of the collision, but the fireman, who remained in the cab, was not injured. The collision occurred at about fifteen minutes after two o'clock in the morning.

The cars which collided with the engine composed a part of a freight train which reached Hearne from the south between 9 and 10 o'clock on the night of the casualty. This train had been placed on track No. 1, and the engine drawing it and the caboose at the rear end had been removed, leaving the south end of the train about two car lengths, or sixty feet, from the switch connecting this track with the main line. Before the freight train reached Hearne the trainmen had inserted an emergency knuckle in the front drawhead of the fifth car from the last, in the place of a regulation knuckle, which had became disabled en route, and Hearne being a division terminal where the defendant maintained car repairers and inspectors, it was the duty of these employes to replace the regulation knuckle before the car could proceed further. The car in question was a "through" car, and was to be forwarded northward in another train which was to leave Hearne about 6 o'clock the next morning. When the freight train arrived at Hearne the conductor reported to the yardmaster and to the repairer, Purifoy, that the emergency knuckle was in the drawhead, whereupon Purifoy procured a regulation knuckle and laid it on the drawhead where the emergency knuckle was, preparatory to inserting it when that car should be separated, by the switch crew operating in the yard, from the other to which it was coupled. The drawheads or couplers worked automatically, and to effect an uncoupling it was only necessary to raise a lever at the end of the car, and this pulled a pin which, as long as it was in place, prevented the cars from becoming uncoupled, but after the pin is raised the cars would not then be separated until the power of the engine is applied to force the cars apart. Purifoy directed the yardmaster to separate the cars so that he could remove the emergency knuckle and replace it with one of the

regular kind, and the yardmaster directed the switch foreman, Menefee, to make an opening for that purpose when convenient. It appears that the pin which secured the coupling in the car where the emergency coupling was had been raised at some time before the collision, and that sufficient force had been applied, not only to make the separation, but to cause that car and the four on the south of it to run toward the switch a sufficient distance, and sufficiently close to the main line, to collide with the incoming passenger engine; but there is no affirmative evidence showing who removed the pin or when this was done. The yardmaster, the switch foreman, the switchman, and the inspector Purifoy, each testified that he did not remove it. These witnesses, except Purifoy, testified that about twenty or twenty-five minutes before the passenger train arrived they went in on track No. 1 for the purpose of making an opening between the cars at a crossing. At this time they knew the passenger train would soon be in. The crossing was just north of the ninth car from the southern end of the string. They testified that, to "cut" the crossing, they coupled on to the north end of the string of cars on this track, and that the switch engineer then brought his engine back against the cars with only sufficient force to take up the slack so the pin could be drawn from the coupling of the car first south of the crossing, and that the engine then went to the northern end of the yard, and had made several switches before the collision occurred. Menefee, the foreman, testified that before making the opening for the crossing he set the brake on the first car left south of the crossing, and that this was sufficient to hold the nine cars on the nearly level track where they were, assuming that all the cars remaining were coupled. All of the defendant's witnesses denied knowledge of the uncoupling of the cars at the point where the emergency coupling was. Purifoy testified that he was not present when the collision occurred, having gone off duty at 12 o'clock, and that he had directed another inspector, Belcher, to insert the regulation knuckle when the cars should be separated for that purpose. The foreman, Menefee, testified that while setting the brake on the car at the time of opening the crossing, he heard Purifoy tell Belcher to put in the knuckle, and that this was twenty or twenty-five minutes before the collision occurred. Belcher did not testify on the trial. While all of defendant's witnesses who were questioned on the subject testified that it was the duty of the switch crew to uncouple and separate the cars, and that the car repairers had no authority to do any part of such work, and that it was the exclusive duty of the repairers to insert the knuckle after the cars had been separated, we think the evidence warrants the conclusion that the act of uncoupling and separating the cars and the insertion of the regulation knuckle were parts of a general scheme looking to the general movement and repair of cars, and that the uncoupling, if done by a repairer, was to the end that the separation and repair be made, and was in the line of his general employment and in furtherance of the defendant's business.

From the foregoing, we think that the jury had the right to conclude, and were warranted in believing, that plaintiff was not guilty of any negligence or contributory negligence precluding his right of

recovery; that the employes of defendant to whom it entrusted the management of its yards and cars at Hearne, knowing that the passenger train would soon arrive, withdrew the coupling pin from the coupler of the car where the emergency knuckle was, without securing the cars between that point and the switch; and, for the purpose of making the separation at that point, or for separating the cars at the crossing, applied such force by the switch engine as to cause the cars to run down to the place of collision; and that this was done by the switching crew and in such proximity, in point of time, to the arrival of the passenger train that the cars had not ceased moving at the time of the collision.

This conclusion is strengthened by the facts, first, that, although the crossing was blocked by the freight train from between nine and ten o'clock in the evening, it was not attempted to be opened, according to the testimony of defendant's witnesses, until about two o'clock in the morning, when the necessity for the opening could not have been so urgent as it was in the earlier part of the night; second, that the separation of the cars to allow the insertion of the knuckle had to be made so as to allow this to be done in time for the car to be incorporated in a train due to leave Hearne at six o'clock; third, that at the time of opening the crossing the matter of inserting the knuckle, after the separation for that purpose had been made, was discussed by the car repairers in the hearing of the foreman, Menefee, whose duty it was to separate the cars; fourth, the time was opportune, and the means and agencies for effecting the separation were at hand; fifth, the cars were uncoupled at the place where the emergency knuckle was, and the five cars south of that place were set in motion so near, in point of time, to the arrival of the passenger train as to be still in motion when the collision occurred.

We further conclude that the jury might also have believed that the pin was withdrawn by a car repairer. If they did so believe, we think that the evidence leaves no room to doubt that, in withdrawing the pin, the repairer was performing an act in the line of his duty and within the scope of his general employment and in pursuance of the defendant's business. Galveston, H. & S. A. Railway v. Currie, 100 Texas, 136; Burnett v. Oechsner, 92 Texas, 588; Lipscomb v. Houston & T. C. Ry., 95 Texas, 19.

We conclude, finally, that the evidence did not raise the issue of the uncoupling having been made by a stranger, or by some one not in defendant's employment, or by any employe other than the switchmen or a repairer, and that the withdrawal of the pin by defendant's employes, and their failure to secure the remaining cars to the south so as to prevent their moving to the place of collision, was negligence on their part which proximately caused the plaintiff's injuries.

These findings necessarily dispose of the first assignment of error, as well as all the other assignments presented by plaintiff in error, save the tenth and eleventh, all of which are overruled.

The tenth assignment assails the thirteenth paragraph of the court's charge as being on the weight of the evidence. The paragraph complained of is as follows: "In this connection, however, and to be considered as a part of the preceding paragraph, you are instructed that,

in determining the question whether plaintiff was guilty of 'negligence,' either in attempting to leave the engine, or in the manner in which he attempted to leave it, or in not remaining on the engine, you will consider what a man of ordinary prudence would have done in view of the danger, under the circumstances." The assignment is without merit, and is overruled.

The eleventh assignment complains that the verdict is excessive. The judgment was for $26,000, which we thought, upon consideration of the assignment, was more than sufficient to compensate the plaintiff for the injuries shown by the evidence to have been sustained by him, and we ordered that the judgment of the court below be reversed and the cause remanded, unless the plaintiff should, within twenty days, enter in this court a remittitur of $4,000, thereby reducing the amount of recovery to $22,000. Plaintiff having at once entered the remittitur, the judgment of the court below is affirmed.

Affirmed.

Writ of error refused.

A. S. HAVARD ET UX. V. CARTER-KELLY LUMBER COMPANY.

Decided February 5, 1910.

Deed—Sale of Timber—Construction.

By a deed the owner of land sold and conveyed "all the pine timber twelve inches in diameter at the stump, now standing, growing and being situated upon" the land, the purchaser to have ten years in which to cut and remove the timber. Held, the purpose of the contract was to convey to the purchaser all pine timber of the dimensions of twelve inches and over at the stump, and not merely such timber as was exactly twelve inches.

Appeal from the District Court of Angelina County. Tried below before Hon. James I. Perkins.

W. J. Townsend, for appellants.

Mantooth & Collins, for appellee.

McMEANS, ASSOCIATE JUSTICE.—The Carter-Kelly Lumber Company, claiming to have purchased from appellants all the pine timber twelve inches and more in diameter at the stump on the two hundred acres of land of appellants, brought this suit seeking to have construed by the court the following deed executed by appellants to it, viz.:

"Know all men by these presents, that we, A. S. Havard and E. A. Havard, husband and wife, of the county of Angelina and State of Texas, for [and] in consideration of the sum of two thousand dollars to us in hand paid by Carter-Kelly Lumber Company, the receipt of which is hereby acknowledged, have granted, sold and conveyed, and by these presents do grant, sell and convey unto said Carter-Kelly Lumber Company, of the county of Angelina and State of Texas, all the pine timber twelve inches in diameter at the stump now standing, growing and being situated upon the following described two hundred acres of land." Here follows the description of the land, the clause

of general warranty, and a stipulation that the purchaser should have ten years within which to cut and remove the timber. The deed was signed and duly acknowledged by both appellants, the wife's acknowledgment being in the form required by the statutes.

Appellee pleaded that the legal effect of the deed was to divest appellants of the title of all timber on said land of the dimensions of twelve inches in diameter and over at the stump, and to vest the title in it, and prayed that the deed be so construed. Appellee in the alternative prayed for other relief, the nature of which, in the view we take of the case, need not be set out.

Defendants answered by general denial and plea of not guilty, admitted the execution by them of the deed, and specially pleaded that they did not by their deed sell to appellee any timber of greater dimensions at the stump than twelve inches, and prayed that the deed be so construed. They also set up other defenses which we think were not material to a proper disposition of the case, and need not be further adverted to.

The case was tried before a jury and, under instructions from the court, a verdict was returned for appellee, upon which a judgment was duly entered construing the deed as prayed for by appellee, and from which judgment Havard and wife have prosecuted this appeal, and assign as error the action of the court in instructing a verdict for appellee.

We think the assignment is not well taken and must be overruled. Dennis Simmons Lumber Co. v. Corey, 140 N. C., 462 (6 L. R. A. (N. S.), 468), is a case very similar in its facts to this. The conveyance described the timber sold as "all pine timber that will measure 12 inches at the stump 18 inches above the ground." In that case, as in this, the defendant contended that the conveyance was only of timber 12 inches in diameter, and that trees of larger dimensions did not pass by the conveyance. In construing the deed the court says:

"Nothing remains now to be determined but the true meaning of the words of the contract, "all the pine timber that will measure 12 inches at the stump 18 inches above the ground when cut." There can be no well-founded doubt, we think, that the vendor intended by the contract to sell, and the vendee to buy, all timber standing on the land which was found to be not less in diameter than 12 inches, by measurement to be made 18 inches from the ground, at the time the trees are reached in the process of cutting. If the contract is read in the manner we have suggested, its effect, of course, will be to pass to the plaintiff the property in timber which is of the dimensions stated in its demand upon the defendants when it tendered payment of the money and also the deed for execution; the terms we have used being but the converse of those we find in the deed, and having, of course, the same meaning. This must be the true construction of the contract, as we can not for a moment suppose that the plaintiff, under the circumstances, would enter into a contract to cut trees exactly 12 inches in diameter for $2,000, payable within five years, with the privilege of ten years to cut them. Such a contract, to say the least of it, would be anomalous, and we agree with His Honor that the defendants were not authorized to put such a construction upon it. The

parties surely did not contemplate that so uncertain an interest in the trees should pass. The plaintiff could not well know that there were any trees of that exact dimension in the forest, and if any, how many were there, or that any would attain that growth within the period named, nor can it be imagined for what purpose trees of that particular size would be needed, or why the time for cutting them was extended throughout so long a period. The evident purpose was to preserve the small standing trees until they had grown to sufficient size to be valuable as timber, and to prevent the forest from being unnecessarily denuded. These and other considerations lead us to reject the defendant's construction of the contract as contrary to the real meaning of the parties."

We think the construction placed upon the conveyance in the above case is correct, the reasoning sound, and we adopt the conclusion there reached as our own.

There are several other assignments urged by appellants for a reversal of the judgment, but they are not presented in such a way as to require or authorize us to consider them. None of them is followed by a statement from the record sufficient to explain and support the assignment or proposition with reference to the pages of the record, as required by rule 31. The judgment of the court below is affirmed.

Affirmed.

FORT WORTH BELT RAILWAY COMPANY v. S. J. JOHNSON.

Decided February 5, 1910.

1.—Practice—Refusal of Charges.

Requested charges are properly refused when they instruct a verdict upon the determination of only one of several issues raised by the pleading and evidence; and so when the phase of the case presented thereby is sufficiently presented in the main charge of the court.

2.—Same—Charge—Grouping Facts.

While a litigant has the right to have presented in an affirmative form any group of facts constituting a defense or cause of action this right should not be so extended as to require the trial court to emphasize by a special charge each separate fact constituting the group.

3.—Trial—Improper Argument—Insinuation of Perjury.

Where, in a suit against a railroad company for damages for personal injuries, the testimony was sharply conflicting upon a material issue, but there was no contradiction or inherent improbability in the testimony of the witnesses for the defendant and no effort was made to impeach them in the regular way, it was error for the trial court to ignore an objection by defendant to the suggestion or insinuation of counsel for plaintiff in his closing argument that the witnesses for defendant had concocted the defense; and the fact that the charge of perjury was veiled in the form of a suggestion rendered it none the less prejudicial.

4.—Same—Poverty or Wealth.

Reference in argument to the poverty or wealth of contending parties is almost if not quite universally condemned. Such argument considered and held reversible error.

Appeal from the District Court of Tarrant County. Tried below before Hon. Mike E. Smith.

Lassiter & Harrison, for appellant.

McLean & Carlock, for appellee.

CONNER, CHIEF JUSTICE.—Appellee was an experienced switchman, and while in the employment of the appellant company was thrown from the top of a moving car and sustained a compound fracture of one of his legs. In substance, it was alleged that appellee and two other members of a switch crew were engaged in transferring cars from one switch track to another, and that as he was walking upon and near the end of the last car but one, the pinman, as he is designated in the testimony, without notice or warning uncoupled the last car and signaled the engineer to reverse the movement of the train, which was suddenly done, thus throwing appellee forward and off the car. He alleged negligence in the foreman and pinman in causing the sudden uncoupling of the car without having given warning, and in the operatives of the engine for making the reverse movement with unusual and unnecessary force.

Appellant pleaded the general denial, and that appellee was guilty of contributory negligence in that, after due notice, he failed to properly secure himself in a position of safety, or if without notice, which was denied, he was guilty of negligence in having failed to acquaint himself with the contemplated movement of the cars and guard himself accordingly. The trial resulted in a verdict of eight thousand dollars, of which appellee remitted three thousand dollars, and judgment was rendered in his favor for the remainder.

Appellant has assigned error to the court's charge and to the action of the court in refusing a number of special charges, but inasmuch as we have concluded that the judgment must be reversed upon another ground, we will but briefly refer to the matter of the charges. Several of the special charges embodied the proposition that if the pinman believed that appellee had notice of the proposed uncoupling and movement of the cars, and acted in the premises with the care of an ordinarily prudent person, the verdict should be for the defendant. This was, however, to ignore other issues of negligence, particularly the alleged negligence of the engineer, and such charges were therefore properly rejected.

Other special charges on the issue of appellee's alleged contributory negligence, we think, were sufficiently presented in the court's main charge. While it is the right of a litigant to have presented in an affirmative form any group of facts constituting a defense, this right should not be so extended as to require the trial court to emphasize by a special charge each separate fact constituting the group.

But the error assigned to the main charge we regard as more serious. In the first paragraph the jury were instructed that "if the jury believe and find from the evidence in this case that on or about the 23d day of September, 1907, while plaintiff was in the employment of the defendant in the capacity of switchman, and that while he was

walking on the top of the car next to the rear car on his way to such rear car in the string of cars in question, as alleged in his petition, and that, while near the end of the car on which he was walking, one of defendant's switch crew, without plaintiff's knowing or being warned or apprised of the fact (if it be a fact) that such was to be done, uncoupled said rear car from the other car on which plaintiff was," etc., they should find for the plaintiff. The objection to the charge is that it is on the weight of the evidence in that it assumes that the plaintiff at the time of his injury was walking from the seventh car to the eighth car. It is sometimes difficult to determine from the authorities just when the charge invades the province of the jury by assuming issuable facts, and while it is, perhaps, not clear that the charge under consideration is subject to the objection made (see Galveston, H. & S. A. Ry. v. Waldo, 32 S. W., 783; Houston, E. & W. T. Ry. v. Summers, 49 S. W., 1107; Triolo v. Foster, 57 S. W., 699), we nevertheless think that upon another trial the criticism should be avoided by so framing the charge as to plainly require the finding of the jury upon the question of whether plaintiff, at the time of the uncoupling which caused his injury, was walking, as he alleged, from the seventh car to the eighth car. Defendant's testimony was to the effect that appellee had gone forward on the train to the eighth or last car and was riding it into the switch, but that, at the command of the foreman, had stepped from the eighth car back upon the seventh car, and was standing there when the uncoupling was made. If this testimony was true appellee, from other evidence, must have known that the eighth car was to be uncoupled, and the inference of his contributory negligence in failing to secure himself after having been warned would hence be strong, and it is by no means certain that the court's charge as quoted was not at least subject to the construction by the jury that the court was assuming as true appellee's theory of the situation. See Texas Cent. R. v. Waldie, 101 S. W., 518; Missouri, K. & T. Ry. v. Wolf, 40 Texas Civ. App., 381 (89 S. W., 780).

Error is assigned to the matter shown in the following bill of exceptions, viz.: "Be it remembered that on the trial of the above entitled cause, and while the attorney for the plaintiff, Mr. Carlock, was making the closing speech for the plaintiff, he addressed the jury substantially as follows:

"'How easy it is for these two men (witnesses for the defendant), working together, knowing that this man received a serious injury, knowing if the company was responsible it was responsible through their negligence, how easy it was for them to concoct a story against this plaintiff, and say there are two of us against one, two of us against Mr. Johnson, and our shrewd lawyer will get up there and argue to the jury, and the jury will go out and find for the defendant, and this man will hobble through life a cripple, without a dollar.'

"At which time, and before Mr. Carlock had finished the sentence, the defendant's counsel interposed an objection to this argument on the ground that it was outside of the record and improper, and tended to prejudice the jury against the defendant and awaken their sympathy for the plaintiff, and on which objection of the defendant the court took no action, and the defendant excepted to the failure of the court

to sustain the objection, and excepted to the action of the counsel in making the argument, and here presents this bill of exceptions No. 6, which it asks be approved and filed in this cause." The bill of exceptions has been duly approved, and we think that, under the circumstances of this case, the argument of appellee's counsel therein complained of requires a reversal of the judgment.

The issues were sharply conflicting. On the issue of appellee's alleged want of notice and of the intended movement of the cars, the testimony of both the pinman and the foreman is in direct contradiction of that of appellee on the same subject. If appellee had such notice, the contention of negligence on appellant's part would be greatly weakened if not wholly destroyed, while the inference of contributory negligence on appellee's part would in that event be greatly strengthened. So that it was vitally important to appellee's case that the foreman and pinman should be discredited. No effort appears to have been made to impeach them in the regular way. No conflict or contradiction, no inherent improbability of story in the testimony of these witnesses is pointed out, and to some of us, at least, there appears to be no justification for the insidious charge that these witnesses had deliberately concocted a false story and committed perjury in the effort to maintain it. That the charge was veiled in the form of a suggestion renders it none the less prejudicial in character. Judgments have often been reversed because of similar language in violation of the rule which requires counsel in argument to confine themselves strictly to the record, and we could, perhaps with profit, quote from the authorities on this branch of the subject, but inasmuch as appellant has emphasized another view of the argument, we will for the present content ourselves with a citation of some of the cases. See McGoon v. Boston M. R. Co., 31 Atl., 156; Chicago, R. I. & T. Ry. Co. v. Musick, 33 Texas Civ. App., 177 (76 S. W., 219); Chicago, R. I. & T. Ry. Co. v. Jones, 81 S. W., 60; Missouri, K. & T. Ry. of Texas v. Huggins, 61 S. W., 976; Moss v. Sanger Bros., 75 Texas, 321; Beville v. Jones, 74 Texas, 158; Gulf, C. & S. F. Ry. Co. v. Scott, 7 Texas Civ. App., 619 (26 S. W., 998).

Appellant insists that "the argument was outside of the record and improper, and tended to prejudice the jury against the defendant and awakened their sympathy for the plaintiff, because it depicted the plaintiff as a pauper." And we all agree that the proposition must be sustained. Appellee testified to much pain and an inability to use his limb since the date of his injury, some fourteen months before the trial; and while Dr. Gilmore, his attending physician, introduced as a witness by appellee, testified to the effect that a comparatively simple and safe operation in removing the fibrous ends of the broken bones would result in a complete recovery, the testimony as a whole perhaps forms a sufficient basis for the argument that appellee "will hobble through life a cripple," but no testimony whatever is found that he must do so "without a dollar." The argument was clearly inflammatory, and in view of the fact that the verdict was for eight thousand dollars, three thousand dollars more than appellee himself finally concluded could be supported, we can not say that the jury were uninfluenced thereby. Reference in argument to the poverty or wealth of

contending parties is almost, if not quite, universally condemned. S. W. Tel. & Tel. Co. v. Taylor, 118 S. W., 188; Duerler Mfg. Co. v. Eichhorn, 44 Texas Civ. App., 638 (99 S. W., 716); Texas & P. Ry. Co. v. Beezley, 46 Texas Civ. App., 108 (101 S. W., 1052); Dallas Cons. Elec. St. Ry. Co. v. Black, 40 Texas Civ. App., 415 (89 S. W., 1089); Houston, E. & W. T. Ry. Co. v. McCarty, 40 Texas Civ. App., 364 (89 S. W., 807); Gulf, C. & S. F. Ry. Co. v. Duvall, 12 Texas Civ. App., 348 (35 S. W., 705); Chicago, R. I. & T. Ry. Co. v. Langston, 19 Texas Civ. App., 568 (48 S. W., 613); Bitterman v. Hearn, 32 S. W., 341; Wichita Valley Mill & Elevator Co. v. Hobbs, 5 Texas Civ. App., 36 (23 S. W., 924); Dillingham v. Scales, 78 Texas, 205; Texas & St. L. Ry. Co. v. Jarrell, 60 Texas, 270; Willis v. McNeill, 57 Texas, 465.

In some of the cases cited the judgments were not reversed because of the improper argument, but in all such cases it will very generally be found that the court was able to say from the record that, because of the court's instruction to disregard it or for some other cause, the improper argument was without prejudicial effect. Appellee insists, in defense of the argument here, that it was interrupted, and should be construed as meaning "that the plaintiff would hobble through like a cripple without a dollar—*of recompense or compensation for such injury*"—and counsel for appellee who made the argument adds, "that such would have been the conclusion of the sentence had no interruption occurred." We are, however, confronted with the fact that nothing in the record that we can consider supports any such inference or explanation. The bill of exception shows that the argument quoted was left before the jury for their consideration without qualification or explanation, and with the added weight of the court's apparent ruling in appellee's favor. Had appellee's counsel withdrawn the argument, or made to the jury the explanation now made, or had the court instructed the jury to disregard the argument, a different question might be presented. But such is not the case. As it is, we conclude that the argument was violative of the specific rule on the subject and of that judicial fairness that the courts at all times should endeavor to maintain.

It is accordingly ordered that the judgment be reversed and the cause remanded.

Reversed and remanded.

KNIGHTS OF THE MODERN MACCABEES v. MARY F. GILLIS ET AL.

Decided February 5, 1910.

1.—Life Insurance—Payment of Dues—Evidence.

The issue being whether certain dues were paid within the time stipulated in the contract of insurance in a benevolent order, it was error to exclude the notice and proofs of death furnished by the beneficiary to which was attached the affidavit of the finance keeper of the lodge, to which the insured belonged, reciting the date when said dues or assessments were paid, the objection to said evidence being that it was hearsay as to the beneficiaries. Said papers were admissible as representations by the beneficiaries.

2.—Testimony—Cross Examination—Change in Testimony.

Where a plaintiff on the second trial of a cause had changed his testimony as to certain material dates, it was permissible for the defendant to ask him on cross examination if he had not changed his testimony as to said dates because on the first trial the jury had returned a verdict against him. The mere fact that the result of the first trial would thus incidentally be made known to the jury would not warrant the court in denying the defendant the right to prove that the plaintiff had changed his testimony in the belief that the verdict would also be changed. The broadest latitude should be allowed on cross-examination of an interested witness.

3.—Husband and Wife—Agency—Admissions by Husband.

A husband is so far the agent of the wife when engaged in the management of her property that statements and admissions by him may be received in evidence as admissions against her interest.

Appeal from the District Court of Bosque County. Tried below before Hon. O. L. Lockett.

J. B. McIlwain and *Cureton & Cureton,* for appellant.—The proof of death and payment of assessments required by a fraternal beneficiary association or order, furnished by the plaintiff under the conditions of the certificate and laws of the order and as an act necessary to be done in order to sustain an action against the order, is competent evidence in behalf of the order against the beneficiary; and in this case, where the proof of death was prepared by the beneficiary and her counsel and furnished the order in compliance with the terms of the certificate and laws of the order as a condition precedent to recovery, it was error upon the part of the court to exclude that part of the proof of death embraced in the affidavit of O. D. White, showing in substance that assessments Nos. 134 and 135 were paid on November 1, 1906 (which, if true, precluded a recovery on the certificate), because such affidavit, being a part of the proof of death so prepared and furnished the order by the beneficiary, was such use of a written document by the beneficiary as amounted to an approval of his statements as correct and to make it an admission by adoption, admissible against the interest of the beneficiary who is the plaintiff in this case. Mutual Benefit Ins. Co. v. Newton, 89 U. S., 32; Mutual Benefit Ins. Co. v. Higginbotham, 95 U. S., 380; Connecticut Mutual Ins. Co. v. Schwenk, 94 U. S., 593; Crotty v. Union Mut. L. Ins. Co., 144 U. S., 621; 2 Wigmore on Evidence, 1265, and cases cited in note 5; Elliott on Evidence, secs. 2387-2389; 7 Ency. Evidence, 547; 6 Current Law, 153; Bacon on Benefit Societies, sec. 42; Davey v. Aetna L. Ins. Co., 38 Fed., 650; Keels v. Mutual Reserve Life Ass'n, 29 Fed., 198; Behr v. Connecticut Mutual Life Co., 4 Fed., 357; John Hancock Mutual Ins. Co. v. Dick, 44 L. R. A., 846; Modern W. of W. v. Von Wald, 6 Kan., 231; Supreme Lodge O. of P. v. Bradley, 109 S. W., 1178; Prudential Ins. Co. v. Breustle, 41 S. W., 9; Buffalo Loan Co. v. Knights Templar & M. Aid Ass'n., 22 Am. St. Rep., 839; North Am. F. Ins. Co. v. Zaenger, 63 Ill., 464; Goldschmidt v. Mutual Ins. Co., 33 Hun, 441; Kipp v. Metropolitan Ins. Co., 41 N. Y. App. Div., 298; Hanna v. Connecticut Mut. Ins. Co., 150 N. Y., 526; Spencer v. Citizens' Mut. Ins. Co., 142 N. Y., 505; Houghton v. Aetna Ins. Co., 73 N. E., 592; Baldi v. Metropolitan Ins. Co., 24 Pa. Sup. Rep., 275.

The court erred in declining and refusing to permit the defendant to ask the plaintiff, A. W. Gillis, if his reason for changing his testimony as to the time and place when he paid assessments Nos. 134 and 135 to O. D. White, from what his testimony was in the first trial of the case, was not because the verdict of the jury on the first trial of the case was against the plaintiffs.

The evidence in this case shows that, at the time A. W. Gillis testified on the former trial of this case, which testimony was shown by the witness J. A. Feagin, he was the agent and representative of Mary F. Gillis throughout the preparation of the proofs of death, in the employment of counsel, and in the commencement and prosecution of this case, and that the testimony of the said witness Feagin was as to acts done and admissions made only after the institution of the suit and not before the inception of the agency, and the evidence showing that his testimony was given upon the witness stand and within the scope of his authority, and showing that he was acting in giving said testimony in good faith with Mary F. Gillis, said evidence was admissible as an admission against the said Mary F. Gillis, and the court erred in limiting its effect with the jury to the contradiction and impeachment of the said A. W. Gillis. McKay v. Treadwell, 8 Texas, 175 to 181; Harmon v. Leberman, 39 Texas Civ. App., 251; Cooper v. Ford, 29 Texas Civ. App., 253; Wigmore on Evidence, secs. 1078-2232; Best on Evidence (Morgan's edition), sec. 175, p. 271; 10 Current Law, 2092-93, and cases cited in notes; City of Joplin v. Freeman, 103 S. W., 130; Miller v. Jones, 107 S. W., 783; Monahan v. Schwartz, 108 S. W., 285; Moore v. Rose, 108 S. W., 1105.

Odell & Johnson and *W. F. Schenck* and *N. Frank Faulk,* for appellees.—That the proofs of death and the attached affidavit were not admissible in evidence: 3 Elliott on Evidence, secs. 2387, 2388 et seq., and cases cited under these sections; 7 Ency. Evidence, 373, 374, 375, 376, 377 et seq., and cases cited on said pages; Continental Casualty Co. v. Jennings, 44 Texas Civ. App., 14.

SPEER, ASSOCIATE JUSTICE.—Mary F. Gillis, joined by her husband A. W. Gillis, sought by this suit to recover from the Knights of the Modern Maccabees the sum of one thousand dollars, the amount of a benefit certificate in her favor on account of the death of her son, Furman A. Gillis. The trial resulted in a verdict and judgment in plaintiffs' favor for the amount sued for.

According to the agreement of the parties the real controversy between them is, whether death assessment No. 134 was paid to appellant or to some one duly authorized to receive the same, on or before October 30, 1906, and whether assessment No. 135 was paid on or before November 30, 1906. If these assessments were paid by Furman A. Gillis, or some one for him, before these respective dates, appellees, it seems would be entitled to recover, otherwise they would not. This is a sufficient statement of the case to make clear the assignments of error hereafter to be discussed.

Appellant complains first of the ruling of the court in refusing to permit it to introduce in evidence the notice and proofs of death fur-

nished by appellees, and particularly that part of same which is contained in the affidavit of one O. D. White attached to and made a part of said proof of death, which affidavit shows that Furman A. Gillis paid assessments Nos. 134 and 135 on November 1, 1906. O. D. White was shown to be finance keeper of Bosque Tent, No. 1386, of appellant order, of which deceased was a member. This testimony was excluded on the objection by appellees that the same was hearsay as to them, and not binding. In this ruling the court erred. The proofs of loss, including the affidavit in question, were furnished to appellant in accordance with the terms of the contract between the parties, and their contents were admissible in evidence as representations on the part of these appellees as to the date of the payment of death assessment Nos. 134 and 135. The representations contained in them were intended to influence the company's action, and good faith and fair dealing would require that the appellees should be held to such representations, unless they can show in excuse that they were made under a misapprehension of the facts. It is not contended, nor can it be, that such representations are conclusive on the parties, but practically all the authorities agree that the proofs are admissible as representations, or "admissions by adoption," as some of the writers put it, subject, however, to explanation or contradiction. Mutual Benefit Life Insurance Co. v. Newton (U. S.), 22 L. ed., 793; Jno. Hancock Mutual Life Insurance Co. v. Dick (Mich.), 44 L. R. A., 846; Haughton v. Aetna Life Insurance Co. (Ind.), 73 N. E., 592; 2 Wigmore on Evidence, page 1265; 7 Encyclopedia of Evidence, page 574; 3 Elliott on Evidence, page 870. While some courts have held otherwise, the great weight of authority and the better rule, we think, is as above indicated. The question has never been decided, so far as we are aware, in this State, but the principle involved is illustrated in our holding that abandoned pleadings and the like may be offered in evidence as admissions of the party filing them. Barrett v. Featherstone, 89 Texas, 567; Texas & P. Ry. Co. v. Goggin, 33 Texas Civ. App., 667 (77 S. W., 1053).

It is next insisted by appellant that the court erred in respect to the cross-examination of the appellee A. W. Gillis. This witness testified, in substance, that he had paid assessments Nos. 134 and 135 the first Monday in October, 1906, but on cross-examination admitted that he testified on a former trial that he paid these assessments in November, 1906. Appellant then asked the witness if it was not a fact that the reason he had changed his testimony as to the time and place he paid O. D. White these assessments was because on the first trial the jury had brought in a verdict against the plaintiffs. The court sustained the objection that this testimony would show the jury that the defendant gained the case on the first trial. It also appears by the explanation to the bill and from the statement of facts that the witness was fully cross-examined as to his testimony on the first trial. In this ruling, too, we think the court erred. It is, of course, true that the result of the first trial as such would not constitute evidence in the subsequent trial. But it is also true that the broadest latitude should be indulged on cross-examination to show a witness' bias or motive. The fact that the witness is a party, or otherwise in-

terested in the recovery—is related to any of the parties, and the like —are cogent circumstances tending to affect his credibility. And the mere fact that it thus incidentally put before the jury the fact that a jury on a former trial had returned a verdict against the plaintiffs would not warrant the court in denying appellant the right to prove, if it could, that this witness, plaintiff as he was, had changed his testimony in the belief that the verdict on another trial would also be changed. Perhaps the evidence should have been limited by a charge, if requested, but, at all events, it should not have been excluded.

Again, the court erred in giving the following special charge requested by appellees, "You will not consider the evidence of the witness J. A. Feagin, stenographer, as to what the witness A. W. Gillis testified to on any former trial or trials of this case for any purpose, except that of contradicting or impeaching the credibility of said witness Gillis, if it does so, and as to whether it does or not you are to be the sole and exclusive judges." This was an improper limitation on the right of the jury to consider the testimony of the witness Feagin, in connection with the former testimony of appellee, A. W. Gillis. A. W. Gillis had joined with his wife in the institution of this suit, and as husband was vitally interested in the recovery, and was so far the representative of his wife that the jury might be authorized to consider his statements given in evidence on the former trial as admissions against her interest. From what has already been said it will be seen that such testimony was of a character to warrant such conclusions.

We find no other errors in the record, but for those discussed the judgment is reversed and the cause remanded for another trial.

Reversed and remanded.

ALVORD NATIONAL BANK ET AL. v. LUTHER F. FERGUSON.

Decided February 5, 1910.

1.—Homestead—Abandonment—Sale.

The facts that the husband contracted for, made a partial payment upon, and received a deed to a tract of land, and that he and his wife thereafter moved from the old homestead to the land so acquired with the intention of making the same their homestead, constituted an abandonment of the old homestead, and a sale of the same thereafter at the instance of the husband by a trustee to whom it had been conveyed as security for debt while occupied as their homestead, would pass title to the same as effectually as if conveyed by the husband and wife themselves, and the fact that the new homestead was lost because of inability to pay for the same, would not affect the question.

2.—Same—Sale by Husband.

In the absence of such fraud upon the wife as would entitle her to a rescission, a sale of the homestead by the husband alone would become effective to convey title when thereafter abandoned as a homestead.

3.—Same—Disposition of Proceeds by Husband—Consent of Wife.

The husband has the right to control the proceeds of the sale of a former homestead, and in the absence of such a fraud practiced upon the wife as

would entitle her to a rescission of the conveyance of the former home, the husband has the right to apply the proceeds of the sale of the same to the payment of community debts, even against the wishes of the wife.

Appeal from the District Court of Wise County. Tried below before Hon. J. W. Patterson.

McMurray & Gettys, for appellants.—The court erred in the judgment rendered in favor of intervener, for that she and her husband had acquired a new homestead from Pierce, and were residing thereon at the time said $800 was procured from the sale of the old homestead; and the old homestead, being thus left and abandoned as such, could be disposed of by the husband, and it was not essential that the wife execute a deed to same, nor that her interest and right should have passed by the deed to Carter. Kirby v. Blake, 52 Texas Civ. App., 173; Marler v. Handy, 88 Texas, 427; Whiteselle v. Jones, 39 S. W., 405.

Where husband and wife convey the homestead—whether the title passes by deed, estoppel or otherwise—and the purchase price of same is paid into the hands of the husband, he may dispose of the money as he chooses without the knowledge or consent of the wife, and she can not follow it into the hands of others and recover it. Coker v. Roberts, 71 Texas, 598; Love v. Breedlove, 13 S. W., 222; Brown v. Willson, 29 S. W., 530; Whiteselle v. Jones, 39 S. W., 405.

The court erred in rendering judgment for intervener, for that said $800 sued for was, at all events, purchase money arising from a sufficient and legal transfer of an interest in the land from plaintiff and intervener to said McGeorge, and the $800 was personal property, and defendants received the same in good faith and applied it on the community debts of plaintiff and intervener with the consent of plaintiff. Hickman v. Hoffman, 11 Texas Civ. App., 605; Laffare v. Knight, 101 S. W., 1034; Allen v. Anderson, 96 S. W., 54; Garner v. Boyle, 34 Texas Civ. App., 42; Whiteselle v. Jones, 39 S. W., 405; Webb v. Burney, 70 Texas, 322; Harrington v. McFarland, 1 Texas Civ. App., 289.

R. E. Carswell, for appellee.

DUNKLIN, ASSOCIATE JUSTICE.—Luther F. Ferguson sued the Alvord National Bank and John T. Carter to recover eleven hundred dollars claimed to be due him by the defendants. His wife, Zedie Ferguson, intervened, and sought a recovery in her own right upon substantially the same allegations contained in plaintiff's petition and some additional allegations hereinafter noted. Judgment was rendered denying plaintiff a recovery, but in favor of the intervener against the defendants for eight hundred and fifty-six dollars, and from the judgment in favor of the intervener the defendants have appealed.

Plaintiffs alleged substantially that on the 8th of November, 1905, they executed an instrument in writing purporting to convey their homestead of one hundred acres out of the Sweeney survey to defendant John T. Carter, with the understanding between the parties

thereto that the same should be effective as a mortgage only to secure the payment of certain indebtedness which plaintiff then owed the Alvord National Bank; that plaintiff and intervener were occupying and claiming the property as their homestead at the time, and continued so to do until September, 1907, when plaintiff decided to sell the same to J. P. Cotton for eight hundred dollars cash and twelve hundred dollars in deferred payments, for the purpose of using the proceeds to acquire another home which he had contracted to purchase from J. W. Pierce; that plaintiff with his family then moved to the Pierce tract, and placed Cotton in possession of the Sweeney tract and procured the execution of a deed of conveyance of the latter track from John T. Carter to Cotton; that as Cotton was unable to raise the cash consideration of eight hundred dollars it was arranged that he should execute a promissory note therefor, and secure its payment by a deed of trust on the property, the note to be then sold and the proceeds of the sale paid to plaintiff; that it was further arranged that the deed to Cotton should recite the balance of twelve hundred dollars as paid so as to create a superior lien on the property in favor of the holder of the eight-hundred-dollar note; that all the papers contemplated by this understanding were executed, and the eight-hundred-dollar note was sold to William McGeorge, an innocent purchaser, the proceeds of which were by defendants applied to the payment of plaintiff's indebtedness to the bank without his consent; that without the proceeds of sale of said note plaintiff and intervener were unable to comply with their contract of purchase of the Pierce tract, and were therefore forced to abandon it; that thereafter they procured a deed from Cotton conveying to them the Sweeney tract and in which deed they assumed the payment of the eight-hundred-dollar note held by McGeorge, which, under the circumstances related, was a valid lien upon the property.

Intervener adopted the foregoing allegations in plaintiff's pleadings, and further alleged that she consented to the conveyance of the Sweeney tract to Cotton with the understanding that the proceeds of such sale would be applied to the purchase of the Pierce tract, and but for that understanding she would not have surrendered the same to Cotton, and that the money realized from the sale of the eight-hundred-dollar note was applied to the payment of her husband's debt to defendant bank without her consent. Upon the facts alleged in their pleadings both plaintiff and intervener prayed for judgment against the defendants for the amount accrued on said note sold to McGeorge.

The trial was by the court without the intervention of a jury, and the following are the findings of fact and conclusions of law filed by the trial judge and made the basis of the judgment rendered:

"*Conclusions of fact as found by the court.*—1st. I find that on the 8th day of November, 1905, the plaintiff, Luther Ferguson, joined by his wife, Zedie Ferguson, conveyed to John T. Carter the 100 acres of land out of the Wm. Sweeney survey described in plaintiff's petition; that said conveyance was in the form of a deed, but was in truth and in fact a mortgage to secure money due by the plaintiff to the de-

fendant bank; that this fact was understood both by the plaintiff and the said John T. Carter, who was an officer in and manager of said defendant bank; that said 100 acres was at that time and for a long time had been the homestead of the said plaintiff and his wife Zedie, and this fact was known to said Carter when he took said deed of conveyance; that Ferguson and his wife continued to live on said place after said conveyance for some time, when they moved off the same and on to a place they contemplated purchasing for a home; that before moving off of said place the plaintiff had negotiated a sale of the same to one Cotton, and, at the instance of plaintiff, the said John T. Carter, one of the defendants, made a deed to the said Cotton for a recited consideration of $2,000—$1,200 cash, and one promissory note for $800; that nothing was in fact paid, except the execution of the note by said J. P. Cotton, payable to order of John T. Carter; that thereafter the said J. T. Carter conveyed said note and all interest he had in the land to Wm. McGeorge, Jr., of Philadelphia, Pa., for and in consideration of the sum of $800, and thereafter the said J. P. Cotton gave a deed of trust on said 100 acres of land to secure said $800 note held by the said McGeorge; that said McGeorge was an innocent purchaser of said note, believing at the time that the instrument from Ferguson and wife to John T. Carter was in fact a deed, and said $800 was a valid lien on said 100 acres of land, the homestead of plaintiff and his wife. That at the time the said Zedie Ferguson signed said conveyance to Carter she did not understand exactly what she was signing, but simply signed the same at the request of her husband; that Mrs. Ferguson, when the land was conveyed to Cotton, did not understand that Carter was to make a deed, but it was her purpose and understanding that the purchase money arising from said sale to Cotton should be used by herself and husband to pay for the other tract of land that they had contracted for and contemplated making their home; that Cotton had no way to make a cash payment of $800 recited in said deed, except to borrow it on the land, which he did; that when the money was paid by McGeorge to the said John T. Carter, he, with the consent of plaintiff, paid or caused it to be paid to the defendant bank on debts then owed by the plaintiff to said bank; that Mrs. Zedie Ferguson, the intervener herein, did not consent to pay any of said money to the bank, and did not know the same was to be so paid, but expected and intended that the same should be used to procure the other homestead they had contracted for; that she would not have consented for the land to have been sold to the said J. P. Cotton, and would not have moved from the place had she not thought that the proceeds arising from the sale of said place would be used to pay on the homestead they contemplated purchasing.

"That after the said J. P. Cotton had executed said deed of trust on said place to secure said $800 to the said McGeorge, and said Cotton, being unable to comply with his contract and purchase, reconveyed the land to plaintiff Ferguson for a recited consideration of $2,000, $1,200 of which was recited as cash, and the assumption of said $800 note made to Carter and by him transferred to said McGeorge; that in truth and in fact nothing was paid by said Ferguson,

except $50 which he gave to Cotton to rue back, taking the place from Cotton subject to the $800 note and interest that had been made by Cotton to Carter, and by Carter transferred to McGeorge.

"The instrument made to Carter, conveying the homestead of plaintiff and his wife, being in fact a mortgage, was invalid, and was so known to the said Carter, who acted for the bank in paying or causing to be paid the proceeds of said $800 note to the bank, one of the defendants herein.

"And by the action of Carter and Cotton a valid lien has been established against said homestead of the plaintiff and his wife without the knowledge and consent of Zedie Ferguson, the intervener herein, wife of plaintiff, and by said transaction her homestead is incumbered for said sum without the knowledge or consent and against her wishes. She should recover of the said defendants said $800 and interest at six percent since the same was paid to said bank."

The facts found by the court, read in connection with the pleadings of plaintiff and his wife, establish an abandonment of the Sweeney tract before its sale to Cotton. In addition to the facts so found by the court, it was shown by the uncontroverted testimony of plaintiff that he procured a deed from J. W. Pierce to the land upon which he moved with his family, and upon which he and his wife both intended to make their home after moving from the Sweeney tract; that he made a partial payment of three hundred dollars for that property and obligated himself to pay the balance of the consideration at future dates. The deed from Carter to Cotton having been made at plaintiff's instance was as effectual to convey title to the Sweeney tract as if it had been executed by the plaintiff in person. There was no finding by the court that in causing the lien to be fixed on the Sweeney tract to secure payment of the eight-hundred-dollar note sold to McGeorge, plaintiff and defendants practiced a fraud upon plaintiff's wife, and no claim was made by plaintiff nor by intervener that the Sweeney tract was the separate property of Mrs. Ferguson at the time Carter executed the deed thereto in favor of Cotton. If that property was not the separate property of the wife, then it was the separate property of the husband, or else the community property of himself and wife, and whether it was the one or the other, he had the legal right to sell it without his wife's consent after plaintiff and his wife had abandoned it as a home. Even though the deed from Carter to Cotton had been executed before such abandonment of the property as a home, in the absence of such fraud upon the wife as would entitle her to a rescission of the sale, it would have become effective to convey title as soon as the abandonment occurred. Kirby v. Blake, 53 Texas Civ. App., 173 (115 S. W., 675); Marler v. Handy, 88 Texas, 427. Neither plaintiff nor his wife sought a cancellation of the conveyance by Carter to Cotton. In the pleadings of both it is alleged that the eight-hundred-dollar note sold to McGeorge was a valid lien upon the Sweeney tract; that they had procured a deed from Cotton reconveying that property to them, and that as a part of the consideration for that conveyance they had assumed the payment of said note, thus conceding the validity of the conveyance by Carter to Cotton. The trial court found that plaintiff had applied the proceeds realized

from the sale of this note to the payment of his indebtedness to defendant bank. It is settled law in this State that proceeds collected on a fire insurance policy issued on a building which is part of a homestead, as well as the proceeds of the sale of a homestead, are exempt from the payment of the husband's debts other than for such debts as are owing for purchase money of the homestead or for taxes thereon. Cameron v. Fay, 55 Texas, 58; Chase v. Swayne, 88 Texas, 218. Neither by the Constitution nor by the statutes is the husband precluded from applying funds so realized to the payment of community debts without the consent of the wife. Her execution and acknowledgment of the deed to the homestead is required by law, but there is no law requiring her consent to the disposition of the proceeds of the homestead by the husband, at least so long as he acts in good faith towards her. The husband has the right to select the homestead for the family, and has the right to control the proceeds of its sale. In the absence of such a fraud practiced upon the wife under such circumstances as would entitle her to a rescission of the conveyance to Cotton, under the rule recognized in Pierce v. Fort, 60 Texas, 464, and Scoggins v. Mason, 46 Texas Civ. App., 480 (103 S. W., 831); Pool v. Chase, 46 Texas, 207; McDannell v. Horrell, 1 Posey Unreported Cases (Texas), 521, the husband's subsequent decision to apply the money realized therefrom to the payment of his debts, without the wife's consent and against her wishes, could not be deemed a fraud upon her authorizing a recovery by her of the money so paid. Whiteselle v. Jones, 79 S. W., 405.

From the foregoing conclusions it follows that the judgment of the trial court in favor of intervener should be reversed; that judgment should be here rendered in defendant's favor as against intervener's suit; that the judgment in defendant's favor as against plaintiff's suit, from which there was no appeal, should not be disturbed, and it is so ordered.

Affirmed in part and reversed and rendered in part

Writ of error refused.

WM. CAMERON & CO. v. L. M. MATTHEWS.

Decided February 7, 1910.

1.—Contract—Performance—"As Little Delay as Possible."

A contract for the delivery of lumber stipulated that it should be delivered on the purchaser's order "with as little delay as possible." In a suit upon the contract the court charged the jury that the obligor was bound to deliver the lumber "in a reasonable time" after receipt of the order. Held, that the expressions were equivalent and there was no error in the charge.

2.—Same—Sale of Lumber—Evidence.

In a suit for damages for breach of a contract to buy and pay for lumber of different dimensions and grades, evidence reviewed and held insufficient to support the verdict for plaintiff.

Appeal from the District Court of Harris County. Tried below before Hon. W. P. Hamblen.

Hogg, Gill & Jones and *Sleeper, Boynton & Kendall,* for appellant. —First assignment of error.—The court erred in giving to the jury that portion of its general charge which is as follows: "You are charged that the contract set out by the plaintiff in its petition, dated July 11, 1907, between L. M. Matthews, the plaintiff, and the William Cameron Company, Inc., was a valid contract; said contract, however, is confined to the quantity of lumber contained in the stock sheet attached thereto, which quantity you will determine from the said stock sheet." This charge was misleading, and on the weight of the evidence, and prejudicial to the defendant, for the reason that the court nowhere in his charge undertook to construe said contract, and the same was executory, and not valid or binding on the defendant in case of failure by plaintiff to perform his part of same; and defendant expressly pleaded, and on the trial introduced evidence showing that plaintiff had not performed his part of the contract, so that the same was not valid or binding on defendant; and the jury might well have inferred from said charge that, in the opinion of the court, the said contract was valid and binding on defendant, notwithstanding the facts pleaded and proved by defendant.

It was the duty of the plaintiff under said contract to deliver the lumber on defendant's orders "with as little delay as possible," which means promptness in delivery to a greater degree than such a phrase as "reasonable time" would imply, and the court committed error prejudicial to defendant in charging the jury to find for plaintiff if he delivered the lumber on defendant's orders in a "reasonable time," instead of "with as little delay as possible," as provided in said contract. 2 Mechem on Sales, sec. 1134.

(Sixth proposition.) It was error for the court to submit any measure of damages more than nominal because the plaintiff did not adduce any evidence upon which the jury might measure the recovery, it not being anywhere shown in the evidence the cost of delivering and loading at Caroline Switch, the contract price being based on lumber loaded at that point.

(Seventh proposition.) In event plaintiff was entitled to recover of defendant, the measure of his damages was the difference between the contract price of the lumber remaining on hand of contract grades and not shipped out by plaintiff on orders of defendant, and the market price of such lumber at Caroline Switch plus the cost of putting it on the cars for shipment; whereas, under the court's charge, the jury was directed to base their finding as to amount of damages on all the lumber embraced in the contract, without taking into consideration that which had been shipped out and paid for by defendant, and without regard to the cost of putting the lumber on the cars, and the market value of the lumber was not confined by said charge to the place of delivery, to wit, Caroline Switch, on the I. & G. N. Ry., in Walker County, Texas, nor was there any evidence offered as to the market value of the lumber at Caroline Switch, or as to the cost of loading said lumber on the cars.

(Third assignment of error.)—The court erred in giving to the jury that part of its charge which reads as follows: "If, on the contrary, you do not believe from the evidence that the said plaintiff was car-

rying out the said contract in a proper and reasonable manner, and was not delivering the lumber on the orders of defendant at such times and in such manner as was reasonable, and not delivering to said defendant the character and grade of lumber provided therein in the several shipments made to the defendant up to the 20th day of November, 1907, and you believe the said plaintiff breached the same contract and did not perform its conditions in a proper and reasonable manner up to the said 20th day of November, 1907, you will find for the defendant."

Andrews, Ball & Streetman, for appellee.—The interpretation placed by the court upon the clause contained in the contract which required appellee to work, load and ship the lumber "with as little delay as possible," was the correct legal construction of said expression in the said contract. Fidelity & Deposit Co. of Maryland v. Courtney, 103 Fed., 599; Florence Gas & Electric L. & P. Co. v. Hanby, 13 So., 343; Hinds v. Kellogg, 13 N. Y. Supp., 922; Palmer v. St. Paul F. & M. Ins. Co., 44 Wis., 201.

The law does not require a strict or literal compliance with the terms of a contract, or, at any rate, does not authorize a rescission of a contract on account of a failure to perform same strictly and literally. If there is a substantial compliance in good faith by one party, and only such minor breaches as can easily be compensated in damages, the other party can not rescind or repudiate the contract. Linch v. Paris L. & G. Elevator Co., 80 Texas, 21; Leeds v. Little (Minn.), 44 N. W., 309; Bishop on Contracts, 2d ed., sec. 1421.

REESE, ASSOCIATE JUSTICE.—In this case L. M. Matthews sued Wm. Cameron & Co., incorporated, to recover damages for breach of contract for sale and delivery by Matthews to Cameron & Co. of a certain lot of lumber. Upon trial, with the assistance of a jury, there was a verdict in favor of plaintiff for the amount claimed, $3,893.48, upon which judgment was rendered. A motion for a new trial having been refused, defendant appeals.

There is no merit in the first assignment of error, which is overruled without discussion.

The contract was for the sale by appellee to appellant of 1,250,000 feet of lumber to be delivered on board of cars at Caroline Switch. A stock sheet showing the amount and dimensions of the lumber was attached to and made a part of the contract to show the lumber sold, being a lot of lumber which appellee had on hand at his sawmill near Caroline Switch. The contract was dated August 24, 1907. The lumber was "to be worked according to orders of" appellant. Appellant agreed to furnish appellee orders for the lumber "with as little delay as possible," and appellee agreed to work, load and ship same "with as little delay as possible."

On November 20, 1907, appellant notified appellee that it would not take any more of the lumber, justifying such action mainly upon the ground, as alleged, of delay on the part of appellee in shipping lumber upon orders sent him. Appellant had, previous to this, received and paid for 119,506 feet of lumber under the contract. The

court gave the jury the following charge: "You are further charged that if you believe from the evidence that the plaintiff was proceeding to carry out the said contract, and was performing his part of said contract in a reasonable manner, and was preparing and delivering the lumber, as in said stock sheet described, upon the orders of the said defendant, in a reasonable time, and of the character and quantity of lumber as described in said contract, up to the 20th day of November, 1907, when the said defendant brought the said contract to an end by its notice of that date and refused thereafter to make any further orders for said lumber, and thereby, if you believe the plaintiff was damaged, then you will find for the plaintiff as damages the difference between the price of the said lumber on the date of their said contract as fixed thereby, which was dated July 11, 1907, and the value of said lumber on the 20th day of November, 1907, and six percent interest thereon from the 20th day of November up to the present time."

This charge is assailed by the second assignment of error on several grounds as set out in the several propositions thereunder. We do not think any of them present substantial merit. The description of the lumber appellee was preparing and delivering as "of the character and quantity" described in the contract, was sufficient to include the grade and quantity. The lumber was to be delivered "upon the orders" of appellant, which was sufficient to require the jury to find that it was such lumber as was called for by such orders. If appellant desired more particular and specific instructions upon these points a special charge should have been requested. It is objected that the jury might, under the charge, have included the lumber that had been accepted and paid for. No issue was made as to this, and it is entirely clear that it was not so included in the verdict.

The fourth and fifth propositions advanced under this assignment are, in substance, that appellee being bound under the contract to deliver lumber on appellant's orders "with as little delay as possible," it was error to instruct the jury, in effect, that he was bound to do so "in a reasonable time." If this were an original question we should be inclined to hold that, by the use of such a phrase as "as soon as possible" or "with as little delay as possible," both meaning substantially the same thing, the parties to the contract meant that more diligence should be used in doing the particular thing required than would be required where it is only agreed, either in express terms or by implication of law, that the thing is to be done "in a reasonable time." When we consider, however, that what is a reasonable time depends upon all the facts and circumstances of the particular case, which might require a much higher degree of diligence and much greater expedition in one case than in another, and that, after all, the phrase "as soon as possible" or "with as little delay as possible" has still that element of what is reasonable in it, in connection with the word "possible," which, unless such meaning is clearly expressed or clearly appears from the context, does not mean more than "reasonably possible" in the particular case, there seems some solid ground for the conclusion at which courts have arrived, that the phrase used in this contract means that the orders shall be filled within a reason-

able time, as stated in the charge of the court. In Lund v. St. Paul, M. & M. R. Co. (71 Pac., 1032, 61 L. R. A., 506), "reasonable time" was held to mean "as soon as circumstances will permit," which means substantially the same thing as "as soon as possible" or "with as little delay as possible." This definition, however, is slightly different from that adopted in Bowen v. Detroit City Ry. Co. (20 N. W., 559)—that is, "so much time as is necessary, in the circumstances, to do conveniently what the contract requires." We find this statement of the law on this question in 2 Mechem on Sales (sec. 1134): "All these terms require construction, and, as to such terms as: 'forthwith,' 'immediately,' 'as soon as possible,' and the like, it must be construction in view of the circumstances of the case and the situation of the parties. Each of these expressions may be somewhat indefinite in meaning, but they are all expressive of promptness to a greater degree than would ordinarily be indicated by such a phrase as 'a reasonable time,' though under peculiar circumstances they may mean no more."

We conclude, however, that the weight of authority sustains the rule as stated in the charge of the court, that appellee was only required to fill appellant's orders in a reasonable time (1 Words and Phrases, title, "As soon as possible," and authorities cited). At all events, it does not appear that if the charge were erroneous, as contended, appellant was prejudiced thereby.

As to the sixth proposition under this assignment, it appears with reasonable clearness from the evidence that the market value as testified to by appellee, as well as the contract price, was for lumber loaded on cars at Caroline Switch. We can see no reason, however, why the evidence should not have been made indisputably clear upon this, and many other questions presented, upon which it is not at all so.

There is no merit in the seventh proposition, and the entire assignment is overruled.

The third assignment of error presents no ground for reversal. Certainly the charge objected to is not affirmative error.

Although the contract called for 1,250,000 feet of lumber, the stock sheet attached to the contract and made a part thereof only showed about 989,988 feet had been delivered. Appellee in his petition claimed as his damages the refusal to take the entire million and a quarter feet less the amount delivered, which is stated to be 1,006,099 feet, and the difference in the contract price and the market value at date of breach at the place of delivery is claimed to be $3,893.48, which is the exact amount of the verdict. It thus appearing with reasonable conclusiveness that the jury had adopted the appellee's statement instead of being guided by the charge of the court, after motion for new trial had been filed appellee remitted a proportionate amount, according to the estimate of $3.86 per thousand, which seems to have been the estimate made by appellee and adopted by the jury as his damages. In making this estimate, however, no attention seems to have been paid by appellee to several material matters which necessarily entered into the question of the amount of appellee's damages. In making his estimate appellee first figured out the contract price

of the lumber, taking the price for lumber of the various dimensions, such price varying from $18.25 per thousand for some of it to $12.25 for lumber of different dimensions, with what appears to be rather an arbitrary deduction for that portion which was of the grade of No. 2. In arriving at the market value, this is stated for the entire list to be $11 per thousand for No. 1 and $10 for No. 2, taking no account of the varying values of the different dimensions of lumber. Furthermore, there is no evidence which we have been able to find in the record as to the proportion of the lumber of the grade of No. 2, which was an important matter, as under the terms of the contract appellant was only required to take of No. 2 lumber such portion as did not exceed twenty percent of the whole, and was not required to take any of it that was under this grade. Thus, in order to recover the amount adjudged to him, after the remittitur, appellee was required to show affirmatively that all of the lumber on hand was No. 2 or better; and further, that not more than twenty percent of it was of the grade of No. 2. In appellee's estimate, upon which the verdict was based, he makes allowance arbitrarily for twenty percent of the lumber as No. 2, and rather assumes than shows by evidence that none of it was of a lower grade which appellant was not required to take.

Appellant in its brief also points out, and it is not denied by appellee, that the estimate of appellee shows that, of certain dimensions of the lumber, there were larger quantities than are embraced in the stock sheet. As appellant bought only the lumber listed in the stock sheet, it seems to us that he could only be required to take of lumber of any particular dimensions the quantity of lumber of the dimensions listed in the stock sheet. No account was taken of this in arriving at the verdict.

These objections to the verdict are not here, nor were they in the motion for a new trial, as specifically presented, probably, as they should be, but we are of the opinion that they are sufficiently so to entitle them to consideration, and the assignments of error which go to the insufficiency of the evidence to support the judgment for the amount thereof must be sustained.

The evidence was sufficient to authorize the finding that the appellant had breached the contract, and the assignments of error presenting that question are overruled.

For the errors indicated, we are of the opinion that the judgment should be reversed and the cause remanded, and it is so ordered.

ON MOTION FOR REHEARING.

Our attention has been called, in motion for rehearing, to an error in our opinion in this cause. In the opinion as filed the following statement is made: "Although the contract called for 1,250,000 feet of lumber, the stock sheet attached to the contract and made a part thereof only showed about 989,988 feet had been delivered." The statement should have been that the stock sheet only showed 989,988 feet, of which 119,506 feet had been delivered.

The motion is overruled.

Reversed and remanded.

P. A. DOWLEN v. C. W. GEORGE MFG. CO. ET AL.

Decided February 7, 1910.

1.—Limitation—Contract to Account.

Where an agent appointed to collect the rentals on certain property and pay over the same to a third party, accepts the appointment and agrees in writing to pay over the rentals in accordance with the terms of an assignment, in a suit by the assignee against the agent for rents collected but not paid over, the four years and not the two years statute of limitation would apply.

2.—Assignment of Rents—Repair of Property.

An agent appointed to collect the rents from certain property and pay over the same to a third party would have no right, without the consent of the assignee, to apply the rents to repairs on the property.

Appeal from the County Court of Jefferson County. Tried below before Hon. Jas. A. Harrison.

Watts & Wheat, for appellant.—The court erred in rendering judgment against this defendant because the undisputed evidence shows that plaintiff's cause of action, if any it ever had against him, accrued more than two years next before this suit was commenced, and was therefore barred by the statute of limitation. Revised Statutes, art. 3354; Turner v. Smith, 11 Texas, 629; Wingate v. Wingate, 11 Texas, 430; 25 Cyc., 1152, and authorities cited.

Crook, Lord & Lawhon, for appellee.

REESE, ASSOCIATE JUSTICE.—This is an appeal from the County Court from a judgment against appellant and in favor of appellee.

The suit is based upon certain instruments. First, an assignment by one Jordan, who was indebted to appellee, of the rents to accrue upon certain property owned by Jordan in Beaumont, the rents to be collected by appellant and by him paid over to appellee's agent; second, an acceptance in writing by appellant of the trust and an agreement to comply with the terms of the assignment; third, a power of attorney from Jordan to appellant authorizing him to collect the rents. Two questions are presented by the appeal.

Appellant is in error in his contention that the statute of limitation of two years applies to this action by appellee against him to recover rents collected by him under the assignment and agreement and not paid over to appellee. The action is based upon appellant's contract in writing as above set out, and is not an action for money had and received only, as contended by him.

The written power of attorney only authorized appellant to collect the rents. These rents had been assigned to, and thereby became the property of, appellee. Thereafter appellant had no right to apply them to the payment for repairs on the building, or to any other purpose, without the consent of appellee or its agent, and it was no defense to appellee's claim that he had so applied them. The issue as to whether Crook, appellee's agent, expressly or impliedly consented

to such application was conflicting, and the finding upon this issue in favor of appellee will not be disturbed.

We have examined the various assignments of error. They present no ground for reversal and the judgment is affirmed.

Affirmed.

REUBEN HOLBEIN ET AL. v. MARGARITA GARCIA DE LA GARZA ET AL.

Decided February 7, 1910.

1.—Injunction—Appeal—Filing Transcript.

The filing in a Court of Civil Appeals of a second transcript of a proceeding for an injunction, within fifteen days after the date of the filing with the clerk of the court of the petition with the judge's order endorsed thereon, satisfies the requirement of the statute that the transcript in such case must be filed in the appellate court not later than fifteen days after the entry of the order of the court, and obviates any objection to the first transcript on the ground that it did not affirmatively appear therefrom that it was filed in due time.

2.—Same—Assignments of Error.

In an appeal from the order of a judge granting a temporary injunction formal assignments of error are not necessary under the Act of 1909. (Gen. Laws, p. 354.)

3.—Same—Practice—Notice.

Courts of equity have the power to grant without notice a mandatory injunction, even to the extent in a proper case of restoring to the owner the possession of premises of which he has been deprived by force.

4.—Same—Legal Remedy—Statute.

The Act of the Thirty-First Legislature amending article 2989, Rev. Stats (Gen. Laws, 1909, p. 304) eliminates any objection to a petition for injunction on the ground that the plaintiff has an adequate remedy at law.

5.—Same—Waste—Irreparable Injury—Pleading.

The unlawful cutting of trees growing upon land is waste and irreparable injury, and to prevent waste is a recognized use of the writ of injunction. Therefore a petition for injunction which, besides alleging irreparable injury generally, alleges a threatened waste by the unlawful cutting of timber growing upon land, states facts showing such threatened irreparable injury as would authorize the interposition of a court of equity to prevent the same by injunction.

6.—Mandatory Injunction—Possession of Realty—Insufficient Pleading.

A petition for a mandatory injunction to restore to complainant the possession of land from which it was alleged that he had been ousted by force, considered, and held insufficient to warrant the issuance of such writ, either with or without notice to the defendant. It is only in extreme cases, such as seldom occur, that such a remedy can be justified before a hearing on the merits.

7.—Prohibitory Injunction—Practice.

It is seldom, under our equity procedure, that it is necessary to issue even a prohibitory writ of injunction without an opportunity given the defendant for a hearing. A temporary restraining order may in all cases be issued compelling immediate cessation of the threatened injury until such time as the defendant can be heard.

Appeal from the District Court of Starr County. Tried below before Hon. W. B. Hopkins.

G. R. Scott & Pope, W. R. Perkins and *Kleberg & Neethe,* for appellants.—An injunction will not be granted where any statutory remedy provides a redress for the injury complained of. Duck v. Peeler, 74 Texas, 271; Chisholm v. Adams, 71 Texas, 681.

Where statutory remedy by sequestration can be resorted to protect property and to acquire the possession of property, injunction will not be granted. Hull v. Quest, 2 Posey U. C., 565.

There being no allegations that appellants are insolvent and no sufficient allegations as to the damage being irreparable, save the conclusion of the pleader, injunction should not be granted unless the petition shows that the property can not be restored to its original condition by money. Nashville, C. & St. L. Ry. Co. v. M'Connell, 82 Fed., 69; Seymour v. Hill, 67 Texas, 387.

A preliminary mandatory injunction should not issue on an ex parte hearing. The court must hear the facts. City of Ft. Worth v. Crawford, 4 Texas Law, Rev., 120; Hall v. Chesapeake, O. & S. W. R. Co., 23 Am. Law Register, 126 (New Series); Weaver v. Toney, 50 L. R. A., 105; Bettman v. Harness, 36 L. R. A., 567.

It is fundamental error to grant a preliminary mandatory injunction without notice. 1 Pomeroy's Equity Jurisprudence, section 507, page 849, 3d ed.

James B. Wells and *F. W. Seabury,* for appellees.—Where irreparable injury to property is threatened, an injunction will be granted irrespective of the existence of any remedy at law. Gen. Laws 31st Leg., First Called Session, ch. 34, amending section 3 of article 2989, Revised Statutes; Burnley v. Cook, 13 Texas, 586; Gilder v. Brenham, 67 Texas, 351; High on Injunctions, sec. 697; Pomeroy's Equitable Remedies, secs. 493, 494 and 495.

A court of equity acquiring jurisdiction will give such complete relief as the circumstances require, and will so shape its remedies as to grant all the relief necessary to the preservation of the petitioner's rights. Joyce on Injunctions, secs. 101-103, 1392; Bussier v. Weekey, 11 Pa. Sup. Ct., 463; McGowin v. Remington, 12 Pa. St., 56, 51 Am. Dec., 584; Nutbrown v. Thornton, 10 Ves., 159.

Where the owner's right is clear and he is in peaceable possession, particularly where the possession has been long continued, a mandatory injunction will be granted to compel a person, whether trespasser or claimant under color of title, who has dispossessed him and interrupted his prior possession, to restore the premises. Pokegama, S. P. L. Co. v. Klamath River L. Co., 86 Fed., 528; High on Injunctions, sec. 356.

A temporary injunction, mandatory or preventive, can be, and in a proper case ought to be, ordered ex parte and without notice to defendants. Rev. Stats., arts. 2993 and 2994; Van Zile's Equity Plead. & Prac., sec. 401, pp. 599-601; Bispham's Equity, sec. 400; Pomeroy's Equity Jurisprudence, sec. 1359, note 1.

REESE, ASSOCIATE JUSTICE.—This is an appeal by defendants from an order of the district judge of the Twenty-Eighth Judicial District in vacation, granting a temporary injunction. The injunction was granted without notice, and the case is before us upon the allegations of the petition and the order of the judge thereon, together with certain assignments of error by appellants, and briefs of both parties.

After the order had been made appellants presented to the district judge an application to have the amount of the bond fixed for appeal, and this application sets out certain facts bearing upon the right of appellees to the writ, but we do not think this paper can rightly be considered by us, though the facts so alleged forcibly illustrate the impropriety of granting the writ prayed for without notice to appellants and hearing their side of the case.

We are met *in limine* by a motion to dismiss the appeal on the ground that the record does not show that it was filed within fifteen days after the entry of record of the judge's order. (Art. 2989, Rev. Stats., as amended by chap. 34, Acts First Called Session Thirty-First Leg., p. 355.) Within the fifteen days from the date of filing with the district clerk of the petition with the judge's order endorsed thereon, a second transcript was filed in this court, showing that fact. This satisfies the requirements of the statute. (Baumberger v. Allen, 101 Texas, 352.) The motion to dismiss is overruled.

The plaintiffs (appellees here) sue in the form of trespass to try title to recover of defendants 20,000 acres of land in a body, and for rents and damages, alleging special damages in cutting down trees and other acts of waste.

It was further alleged that appellees had been lawfully seized and continuously in actual, quiet and peaceable possession of the premises for more than fifteen years, using the same for pasturing their live stock, cultivating fields and raising crops, etc. That appellants, on or about September 15, 1909, "being then and there in effect naked trespassers," unlawfully, forcibly and violently seized the possession of said premises, and drove or caused to be driven out of said pasture the live stock of appellees and their tenants, and placed in the pasture their own cattle; that they molested the tenants and caused them to leave with their effects and live stock; that appellants had torn down and removed about three miles of wire fence, and moved and altered other fences, cut down timber, and committed other great waste; that appellants have kept one of appellees' tenants from watering his live stock at the wells and other watering places on the premises, and have driven the larger part of said live stock into a small corner of the pasture where they have no water, and fenced them in there by building a new fence, cutting the stock off from water; that appellants have driven out appellees' tenants in possession under contracts still in force, thus making appellees liable to a multiplicity of suits on the part of their said tenants.

So much for what appellants are charged with having done; in addition to which it is charged that they are intending and threatening to continue with force and arms to hold possession of the premises and prevent appellees and their tenants from entering upon or

using the same, and will immediately tear down and remove the fences now dividing the lands into the several pastures, and build other fences and divide the land into other pastures not suitable for the uses of appellees or their tenants; and allow the house, wells, windmills and other improvements to fall into disrepair; and cut down and convert to their own use large quantities of valuable timber, and do other waste to said land and improvements; stock the pastures with a large number of live stock, and destroy the grass now needed for the live stock of appellees and their tenants, and specially needed for the reason that the winter is now coming on and the grass urgently needed for said live stock. It is alleged that by reason of the facts stated appellees will sustain irreparable injury, for which they have no adequate remedy at law.

It was further alleged that appellants were asserting some claim of right or interest in and to said lands or some portions thereof, the exact nature of which is unknown to appellees, except that the claim is based upon a certain instrument in writing, a copy of which is attached to the petition and prayed to be considered as a part thereof. This instrument is a contract dated August 6, 1909, executed and acknowledged by Reuben Holbein and G. R. Adams, and also signed by appellees, B. de la Garza and his wife, Margarita Garcia de la Garza, the execution by them being proven by a subscribing witness. The instrument was duly recorded August 16, 1909. By this instrument appellees contracted to sell to appellants the land in controversy, 20,000 acres, for the price of $3 per acre, to be paid as follows: $1500 cash upon delivery of an abstract showing clear title satisfactory to purchasers' attorneys, the assumption of a certain mortgage for $25,000, and the balance to be paid in one, two, three, four and five years, in equal installments. The seller is to have thirty days to furnish abstract and survey the land, and the purchaser thirty days thereafter to examine abstract. $500 earnest money was paid by appellants, which was to be forfeited if they failed to comply with the contract, and to be refunded if seller so failed. With regard to this instrument it is alleged that the land is the separate property of Margarita de la Garza, wife of B. de la Garza, and that she did not acknowledge execution as by statute required, and the same is void as to her. It is further averred that Bernardo de la Garza furnished appellants with abstract of title and caused the land to be surveyed as provided in the contract, but that appellants did not approve the title within the thirty days allowed, nor pay the cash as required, and that they have never done so, and that all rights of appellants hereunder have been forfeited. The petition concludes with the following prayer:

"The premises considered, the plaintiffs pray that upon the presentation to and consideration by Your Honor of this petition you award an order to issue at once your most gracious writ of injunction herein, commanding the defendants and each of them and their and each of their counselors, solicitors, attorneys, agents, servants and employes, and all those acting under them, to immediately vacate all and every part of said lands and pastures, as hereinbefore described; and to immediately remove their cattle and live stock therefrom; and

to immediately yield and restore to plaintiffs the possession of said lands and pastures; and also enjoining and restaining said defendants and each of them, and their and each of their counselors, solicitors, attorneys, agents, servants and employes, and all those acting under them, from remaining upon or holding the possession of said lands and pastures or entering thereon, and from cutting down or destroying any trees or timber thereon, or removing any trees, timber or other things from said land, save only their aforesaid live stock or any other personal property they may have thereon; and from molesting, threatening or in any manner disturbing plaintiffs or their tenants, lessees, employes, or other persons holding or acting under them, in the quiet and peaceable possession, use, cultivation, residence upon, pasturing of live stock upon, or enjoyment of said lands and pastures and every part thereof." Then follows prayer for recovery of land and damages, removal of cloud and perpetuation of injunction.

The petition, duly sworn to, was presented to the judge on November 19, 1909, and on the same day he endorsed his order granting the injunction as prayed for upon proper bond. From this order this appeal is prosecuted.

The record does not show when the petition was presented to the judge, but the statement is made in the brief that it was so presented on the same day that the order was made, and that this order was made without notice. These statements are not denied, and we assume that they are true.

Formal assignments of error are not required in appeals of this character. (Act 31st Leg., *supra.*) The assignments of error in the record, however, may be looked to in determining the objections made to the order. That they do not technically comply with the rules will not be regarded.

It is objected to the granting of the writ that it was granted without notice, and this objection is more particularly leveled at those portions thereof which are mandatory, commanding appellants to get off the premises with their movable property. In so far as this denies the power to grant without notice a mandatory injunction, even to the extent of restoring to the owner the possession of premises of which he has been deprived by forcible trespass, in a proper case, it can not be sustained. Such an injunction was sustained by this court in Jeff Chaison Townsite Co. v. McFadden, Weiss & Kyle Co., 56 Texas Civ. App., 611 (121 S. W., 719), citing authorities.

The objection that, according to the allegations of the petition, appellees have an adequate remedy at law, seems to be completely eliminated by the provisions of the Act of the Thirty-first Legislature, amending article 2989, Revised Statutes, *supra,* if, indeed, the decision of the Supreme Court, in Sumner v. Crawford (91 Texas, 129), left anything of real substance in that doctrine, under our system of blended law and equity jurisdiction in the courts.

It is further objected that it is not shown by the petition that the apprehended injuries to the property are irreparable. It is true, as contended by appellants, that it is not sufficient when the writ of injunction is sought on this ground to merely allege that the commis-

sion of the threatened acts will result in irreparable injury, but that such facts must be stated as will show that such will be the result. (1 Joyce on Inj., sec. 139; Indian River Steamboat Co. v. East Coast Trans. Co., 10 S. R., 480.) Referring to the allegations of the petition, we can not say that some of the threatened acts of waste, such as cutting down trees, etc., do not show such irreparable injury, as that term is defined, to the freehold as would authorize the interposition of a court of equity to prevent the same by injunction. To stay waste, resulting in irreparable injury to the premises pending a suit in ejectment or in our action of trespass to try title, is a recognized use of the writ.

While, as we have stated, it is in the power of a court of equity even to go so far as, by the writ of mandatory injunction pending a trial upon the merits, to restore the *status quo* of the premises where that status has been interrupted by the forcible and violent ouster of the complaint, we do not think such use of the writ is authorized by the allegations of the petition. We must confess that we can get nothing of a substantial nature out of the allegations of the petition, other than would be appropriate to any ordinary action of trespass to try title, with added claim for rents and special damages, and an ordinary application for an injunction to prevent irreparable injury to the freehold pending the suit. We find nothing that would justify the mandatory provisions of the injunction, sweeping appellants off of their feet, as it were, by a command, without notice or a hearing, to vacate the premises with all of their movables. It is only in an extreme case, such as does not frequently occur, that such a remedy can be justified. The facts of the case, in Chaison v. McFadden, *supra*, which are fully stated in the opinion, and in Pokegama Lumber Co. v. Klamath River Lumber Co. (86 Fed., 529), are indicative of the circumstances which must exist in order to justify the use of this kind of process in an action to recover the possession of realty pending a hearing on the merits. Nothing of the kind is indicated in this petition. It is true that it is alleged that appellees have been in actual, peaceable possession for fifteen years, but that adds nothing of substance to the usual allegations in an action of trespass to try title. (Art. 5150, Rev. Stats.) Neither are the allegations that the entry of appellants was unlawful, that they were without any right, title or color of title, and are in effect naked trespassers, and that they forcibly and violently seized the possession of the premises and dispossessed appellees and their tenants, anything more than appropriate allegations in an ordinary action of trespass to try title. That appellants were trespassers, that they were without title or color of title, that appellees were in possession and were ousted by appellants, are all of the essence of the old action of ejectment, and of our action in trespass to try title. If the ouster consisted in putting the cattle of appellees and their tenants off the premises, putting their own in the pasture, this adds nothing to the force of the usual allegations of possession on the one hand and ouster on the other. It is a usual and ordinary form of pleading in cases of this character to allege that defendants with force and violence entered upon the premises and ejected plaintiffs therefrom, and with like force and violence re-

tains the possession. This is a mere legal fiction, and is so regarded. If there be any force in the use of the words that appellants are "naked" trespassers in the sense that they are without even any claim of right, a mere general and formal allegation, the reference to the contract of sale, and that appellants claim some right thereunder suggests, if it does not directly indicate, that they are not "naked" trespassers in the sense of being without claim of right. There is nothing in the petition indicative of such a state of facts as would justify or authorize the dispossession of appellants by the mandatory writ pending the trial.

It was for a long time held that such mandatory writ could not be resorted to at all for the purpose of transferring the actual possession of land pending a suit for the title and possession in any case, and although this doctrine in its strictness has been gradually departed from by courts of equity, still the doctrine remains that it is to be resorted to "only in a strong and mischievous case of pressing necessity." (Chaison v. McFadden, Weis & Kyle, *supra.*) It is not to be forgotten that, while it is alleged in the petition that appellants entered upon the premises and ousted appellees, driving out their cattle and their tenants, on the 15th of September, no resort is had to the court for relief until the 19th of November. This does not look like a prompt attempt to restore the *status quo* which had been interrupted by the actual violence of appellants, as the Chaison case and other cases there cited.

Our conclusion is, that neither with or without notice was the mandatory injunction, transferring the possession from appellants to appellees upon the facts stated in the petition, authorized.

As to the issuance of the prohibitory injunction without notice, much must be left to the sound discretion of the judge. Article 2994, Revised Statutes, provides: "Upon application for any writ of injunction, if it appears to the judge that delay will not prove injurious to either party, and that justice may be subserved thereby, he may cause notice of such application to be served upon the opposite party, his agent or attorney, in such manner as he may direct, and fix a time and place for the hearing of such application."

The petition in this case, we think, discloses no reason why notice should not have been given before the issuance of a writ so sweeping in its character as was ordered in this case. *Audi alteram partem* is one of the maxims of the old civil law, and the doctrine that a man should not be condemned without a hearing is not only the instinct of justice, but this spirit breathes through the whole system of common law, and especially through our system of equity, as distinguished from law, which seeks to temper the harshness of the common law and bring it more in harmony with the principles of abstract justice. It is rarely, under our equity procedure in regard to the issuance of injunctions, that it becomes necessary to issue a temporary writ of injunction, even a merely prohibitory writ, without a hearing. If it appears necessary from the allegations of the petition that a defendant be stopped at once, and without the delay necessary to give notice and an opportunity to be heard, temporary restraining order may in all cases be issued compelling immediate cessation of the threatened

injury until such time as may be reasonably required to allow the defendant to present his side of the case, which may change the whole aspect of the controversy. If it be said in answer that a defendant may obviate this difficulty by a motion to dissolve, wherein he may fully present his objections to the issuance of the writ, the reply is apt and conclusive that, under the peculiar rule adopted by the Legislature allowing appeals from an order granting a temporary injunction, but not to an order refusing to vacate on motion to dissolve, a defendant would ordinarily lose by lapse of time his right to appeal from the order granting an injunction if he delayed until his motion to dissolve could be heard. It is, we think, a serious omission in the law on this subject that no appeal is given from an order overruling a motion to dissolve. This court had occasion to express its views upon this defect in the statute in the Chaison case, 56 Texas Civ. App., 611 (121 S. W., 717).

In so far as the merely prohibitory features of the present case are concerned, while we are of the opinion that even that should not have been issued without notice, a temporary restraining order until a hearing upon the application for temporary injunction being all that was required to meet any possible emergency disclosed by the petition, still we do not think that the action of the judge in making the order without notice was such an abuse of judicial discretion as warrants us in vacating the prohibitory order, which will be allowed to stand. We are of the opinion, however, that the order dispossessing appellants and transferring the possession to appellees, was not authorized by the facts disclosed by the petition, assuming all of them to be true; and that portion of the injunction will be set aside and vacated.

The record does not contain a copy of the writ, but the judge's order covers all of the grounds of the prayer, and we assume that the writ follows the terms of the prayer. It is therefore ordered that, in so far as the writ of injunction restrains the appellants from cutting down or destroying any trees or timber or removing any trees, timber or other thing from said land, and from molesting or in any manner disturbing the tenants of appellees in possession of any portion of said land under existing contracts of lease or renting, in the quiet use and possession of and residence upon the same, with free access to water and pasturage for their live stock such as they are entitled to under their contracts of lease or renting, the order is affirmed, and as to all other provisions, orders and commands of said injunction the order is reversed and the injunction set aside and vacated. Costs of this appeal are adjudged against appellees.

Affirmed in part and reversed in part.

INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY v. F. J. FICKEY.

Decided February 9, 1910.

1.—Damages—Opinion.

A witness can not be permitted to give his opinion as to the amount of damage suffered by defendant (injury to his land by washing caused by overflow). He should state the facts, including market value before and after the injury, the amount to be determined by the jury under proper instructions as to the measure.

2.—Requested Instructions.

The proof raising a question as to how far the loss of plaintiff's cotton crop was due to overflow or to injuries by the boll weevil, defendant was entitled to a requested instruction that it was not liable for injury by the latter cause.

Appeal from the District Court of McLennan County. Tried below before Hon. Marshall Surratt.

King & Morris and *W. S. Baker,* for appellant.—Witness can not give his estimate of amount of damages. San Antonio & A. P. Ry. Co. v. Keirsey, 101 Texas, 513; Green v. Taylor, B. & H. Ry. Co., 79 Texas, 608; Gulf, C. & S. F. Ry. Co. v. Locker, 78 Texas, 279.

There was evidence of boll weevil in appellee's cotton, and this issue should have been submitted, because plaintiff would not be liable for any portion of the damage done appellee's cotton by boll weevil. San Antonio & A. P. Ry. Co. v. Gurley, 37 Texas Civ. App., 283.

Allen D. Sanford and *Geo. N. Denton,* for appellee

KEY, ASSOCIATE JUSTICE.—Appellee brought this suit seeking to recover damages from appellant, alleged to have been caused by the negligent construction of appellant's roadbed, including a certain ditch. The plaintiff charged that the ditch caused an excessive flow of water over and upon his farm, thereby injuring and destroying certain crops and damaging the land.

There was a jury trial which resulted in favor of the plaintiff, and the defendant has appealed.

We sustain the ninth assignment of error and reverse the case because the trial court, over appellant's objection, permitted the witness Casey to testify that, in his opinion, the plaintiff's farm had been damaged $1,000 by reason of the washing of the land. The witness should not have been permitted to give his opinion or estimate as to the damage referred to. In such matters the rule is that witnesses should state the facts, including the market value of the land immediately before and immediately after the alleged injury, and then the jury, under proper instructions as to the measure of damages, must determine the extent and amount of damages sustained.

In regard to the twelfth assignment we deem it proper to say that if, upon another trial, testimony is submitted tending to show that the cotton alleged to have been destroyed or injured was also injured

by boll weevils, the court should, if requested to do so, instruct the jury that appellant would not be liable for any injury to the cotton caused by such insects.

The other questions of law presented in appellant's brief have been considered and are decided against appellant.

On account of the error referred to the judgment is reversed and the cause remanded.

Reversed and remanded.

FRANK UHER ET AL. V. CAMERON STATE BANK.

Decided February 9, 1910.

Appeal from Justice Court—Judgment—Practice.

An appeal by one defendant from a judgment against three makers of a promissory note removed the entire case for trial de novo. A judgment by default entered against appellant and his sureties on appeal bond, not disposing of the other defendants, was void, and it was proper practice, at a subsequent term, on motion, to dismiss as to such defendants not disposed of, on showing that they were insolvent, and enter the judgment nunc pro tunc against appellant and his sureties.

Error from the County Court of Milam County. Tried below before Hon. John Watson.

W. A. Morrison, for plaintiff in error.

U. S. Hearrell, for defendant in error.

KEY, ASSOCIATE JUSTICE.—The nature and result of this suit and the facts upon which a reversal is sought are set out as follows in the brief of the plaintiffs in error:

"This action was begun in a Justice Court in Milam County on the 13th day of January, 1908. The action being one by the Cameron State Bank to recover against Frank Uher, Thomas Blinka and F. O. Richter, as defendants, on a certain promissory note in the sum of $100, providing for eight percent interest and ten percent attorney's fees; and it was alleged that $125 was due on the note. On the 29th day of February, 1908, there was a trial in the Justice Court, which resulted in a judgment against the three above named defendants, jointly and severally, for the sum of $122.37 and costs of suit, and for execution, and said judgment finding that the defendant Richter was endorser, and providing that the execution first issue against the defendants Uher and Blinka.

"From the above judgment the defendant Thomas Blinka alone perfected an appeal to the County Court of Milam County, and for that purpose entered into a bond in the sum of $245, conditioned as required by law, which bond was signed by the defendant Blinka as principal and V. A. Kubecka and J. E. Hill as sureties. The said bond was approved by the justice of the peace on the 6th day of March, 1908, and on the 6th day of April, 1908, the bond and tran-

script were filed in the County Court of Milam County, Texas. The County Court of Milam County met for the April term on the 6th day of April, 1908, the very day the transcript was filed in said court. On the next day, April 7, 1908, a judgment by default was rendered in the County Court against Thomas Blinka for the sum of $124.52 and all cost of suit, including the cost from the Justice Court, and against the sureties on his appeal bond for the amount rendered against the principal, but no disposition was made of the defendants Uher and Richter.

"The April term of the County Court adjourned on the 25th day of April, 1908. The December term of the County Court begun on the 7th day of December, 1908, and adjourned on the 26th day of December, 1908. Prior thereto, on August 10, 1908, the plaintiff Cameron State Bank filed an amended petition in which it set up the note sued on and alleged that on the 29th day of February, 1908, it had recovered a judgment against all of the defendants, Uher, Blinka and Richter, and in which it was alleged that on the 7th day of April, 1908, a judgment had been rendered against the defendant Blinka and his sureties on his appeal bond, but that the judgment was only interlocutory for the reason that it had not disposed of the defendants Uher and Richter. In this amended petition it was alleged that the defendants Uher and Richter were both insolvent, and prayed that the suit be discontinued and dismissed as to said last two named defendants, and also prayed that the 'purported' judgment, as theretofore rendered on the 7th day of April, 1908, be set aside, and asked for a new judgment against Blinka and the sureties on the bond for the amount of the note, interest and attorney's fees. On page 15 of the transcript will be found a certificate signed by J. T. Miller, stating that on the 13th day of August he had delivered in person to Thomas Blinka, one of the defendants, a certified copy of the amended petition. This paper has no file mark upon it, and there is nothing in the record to show that any writ was ever issued commanding the said constable to deliver said copy, nor is it sworn to, nor does it appear how it came among the papers of this action.

"On the 25th day of November, 1908, there was an application filed in the County Court asking to have a judgment entered nunc pro tunc in this cause, in which it was alleged that on the 20th day of August the plaintiff, Cameron State Bank, had recovered a judgment and that the judgment had not been entered, and the judgment was asked to be entered nunc pro tunc, and this judgment seems to have been entered at the December term. On the 25th day of November, 1908, notice to the defendants, Blinka and his sureties on his appeal bond, seems to have been issued. This notice did not purport to be a copy of the motion filed by the plaintiff, Cameron State Bank, but was simply a notice to the effect that a motion had been filed.

"The December term of the court began on the 7th day of the month, and on the 12th another judgment was rendered against the defendants, Blinka as principal, and Kubecka and Hill as sureties, and in which the alleged judgment of August 20, 1908, was purported to have been entered nunc pro tunc; and there still being no answer by any of the defendants, a judgment was rendered against

the defendant Blinka and his sureties, jointly and severally, for the sum of $124.17.

"On February 27th, 1909, the defendant Thomas Blinka filed in said court his application for writ of error to this court, and on the same day a citation was duly issued and served by the sheriff of Milam County on the defendant in error. At the same time the defendant Thomas Blinka filed his supersedeas writ of error bond, which was approved, and on the 13th day of April, 1909, filed his assignments of error, and has brought the same case into this court for correction and revision."

We deem it proper to add that the last judgment, of date December 12, 1908, contained a dismissal as to the defendants Uher and Richter.

Without considering in detail the several assignments of error, we announce our conclusion that no error has been shown, and the judgment should be affirmed. The appeal by the defendant Blinka from the Justice Court to the County Court carried the entire case to that court for trial de novo. The first judgment, as entered upon the minutes, did not dispose of two of the defendants, and therefore it was void and of no effect. (Linn v. Arambould, 55 Texas, 611.)

In Linn v. Arambould, *supra,* it was held that such a judgment was void, and left the case pending in the court as though there had been no trial. In that case several years had elapsed, and it was suggested, as proper practice, that the case be redocketed and retried on its merits under such requirement of notice as might be proper. In the case at bar the course suggested was pursued to this extent: proper notice was given, but the case was not retried, but judgment entered nunc pro tunc, because it was shown by proof, as alleged in the application to render judgment nunc pro tunc, that a proper judgment had been rendered in the first instance on April 7, 1908, which finally disposed of all the parties, but that such judgment had not been properly entered upon the minutes of the court. That was the proper course to pursue. (Whittaker v. Gee, 63 Texas, 435.)

No error has been shown and the judgment is affirmed.

Affirmed.

HIGGINS MILL & ELEVATOR COMPANY v. R. W. GOSSETT ET AL

Decided February 9, 1910.

1.—Contract—Sale.

Evidence considered and held sufficient to show a completed contract in writing, by letters and telegrams for sale of a car load of cane seed.

2.—Same—Parol Evidence—Technical Terms.

Parol evidence is admissible to show the technical or special meaning of words used in a written contract, as "shipping instructions" in a contract of sale.

3.—Pleading—Justice Court—Parties.

The omission by clerical error in the statement on the docket of the name of one of the members of the plaintiff firm, which was properly given in the citation and judgment in Justice Court, does not make it error to render judgment in his favor on the trial on appeal.

Appeal from the County Court of Williamson County. Tried below before Hon. T. J. Lawhon.

W. A. Barlow, for appellant.—The written evidence introduced on the trial of this cause does not include all the terms necessary to constitute an agreement. The court, therefore, erred in concluding, as matter of law, that they had entered into a binding contract. Seley & Early v. Williams, 20 Texas Civ. App., 405; San Antonio Gas & Elec. Co. v. Marx, 87 S. W., 1166; Jackson & Bro. v. Butler, 21 Texas Civ. App., 379; Simkins on Contracts, 2; 1 Page on Contracts, sec. 27.

If the meaning of a written instrument is clear, a trade usage can not change the meaning of the words or add incidents so as to vary or add to its meaning; the words "shipping instructions," as used by defendant to plaintiffs in the letter introduced in evidence, taken in its connection, being clear of ambiguity, it was for the court to construe, and was error to permit the plaintiff to construe same for the court. 2 Page on Contracts, secs. 1108, 1111; Deacon v. Mattison, 91 N. W., 35; Fairly v. Wappoo Mills, 29 L. R. A., 215; 1 Elliott on Evidence, sec. 605; 9 Ency. of Evidence, 383.

The court committed fundamental error in rendering judgment in favor of R. W. Gossett, C. B. Challenner and W. H. Gossett, for the reason that the pleadings show R. W. Gossett and C. B. Challenner alone to be the plaintiffs. Dunlap v. Sutherlin, 63 Texas, 38; Houston, E. & W. T. Ry. Co. v. Skeeter Bros., 44 Texas Civ. App., 105.

O. E. Roberts, for appellees.—Any words in a contract having a technical or special meaning may have such meaning explained by parol evidence, and this is not a variation of the terms of the writing, but a proper means of reaching the meaning of same. Because common words are used in a phrase which is shown to have a special meaning among any particular class of persons, such as tradesmen using the same, is no reason why such special or technical use can not be explained, not modified or changed, by parol evidence. Rev. Stats., art. 1603; International & G. N. R. Co. v. Philips, 63 Texas, 590; Rector v. Orange Rice Mill, 100 Texas, 591; Townes' Texas Pleading, 286.

The citation issued by the Justice Court in the case shows R. W. Gossett, C. B. Challenner and W. H. Gossett originally instituted the suit; judgment was rendered against all three of these parties in the Justice Court, and the written demand filed in the Justice Court was also in favor of W. H. Gossett. The docket entry cited in appellant's statement is a clerical error.

FISHER, CHIEF JUSTICE.—This is an action for damages brought by appellees, as partners, under the firm name of the Taylor Produce Company, against the appellant mill and elevator company, for an alleged breach of contract to deliver to appellees at Taylor, Texas, a carload of cane seed, to be made up of one-fourth amber and three-fourths red top. Suit was originally brought in the Justice Court and the case was tried there, which resulted in a judgment for the ap-

pellants herein. The case was appealed to the County Court and judgment was rendered in favor of R. W. Gossett, C. B. Challenner and W. H. Gossett, against the appellant for the sum of $185.50.

The appellant has this statement in its brief: "Preliminary to a formal consideration of the assignments of error, we beg to suggest that the appellees brought their suit upon an alleged written contract, and this appeal presents but three questions for consideration: 1st. Does the written evidence introduced on the trial of this case establish a contract? 2d. If not, then did the trial court commit an error in admitting, over appellant's objection, the testimony of R. W. Gossett, one of the plaintiffs, supplementing said written evidence by giving his explanation of the expression 'shipping instructions,' contained in one of appellant's letters to appellees? 3d. Does the judgment rendered by the court conform to the pleadings and evidence?"

Appellant's first assignment of error complains of the conclusion of law of the trial court in holding that the parties had entered into a contract, by the terms of which defendant was bound to ship to plaintiffs one car of amber and red-top cane seed by February 10, 1908, according to instructions furnished by plaintiffs to defendant, and in rendering judgment in favor of plaintiffs against the defendant. Waiving the question that this assignment is irregular in attempting to require the court to pass upon the facts upon a complaint as to a conclusion of law, we will nevertheless consider it in connection with the facts. The contract in question, relating to the shipment, was based upon letters and telegrams that passed between the appellant and the appellees. The trial court held that the evidence was sufficient to show a completed contract; in other words, an agreement upon the part of appellant to ship and deliver the seed in question to appellees at Taylor, Texas, at a certain named price and of a certain quality, and that the appellant had breached the contract. The evidence justifies this conclusion.

The second assignment complains of the action of the court in admitting the evidence of the witness R. W. Gossett, to the effect that the expression "shipping instructions" used in one of the letters from defendant to appellees had a special meaning, which meaning he testified to. The contention of the appellant is that this testimony was not admissible because the contract, being in writing, it would vary its terms to permit a witness to explain the meaning of the expression "shipping instructions." It is true that the letters and telegrams constitute a written contract, and there is contained in one of the letters the expression "shipping instructions." The witness testified to the fact that this expression had a special meaning, and testified as to what that was. It is not a violation of the rule to admit parol evidence to explain an expression in a contract that has a technical or a special meaning. If the expression is a matter commonly understood it needs no explanation, but if it is a term that is not of that class, but has a special significance, it can be explained. It is often done, and it is permissible to do so to explain technical terms employed in a written agreement. That was the effect of this evidence.

There is nothing in appellant's fifth assignment of error, which is submitted as a proposition, and which they term as fundamental er-

ror, on account of the fact that they claim that the court erred in rendering judgment in favor of R. W. Gossett, C. B. Challenner and W. H. Gossett, for the reason that the pleadings showed R. W. Gossett and C. B. Challenner alone to be the plaintiffs. This question is explained by the record. It is clear from the record that all three of the parties named in the judgment were parties to the suit as parties plaintiff; and the omission in the statement of the issues presented in the County Court to name W. H. Gossett as a party was clearly a clerical error, and is corrected by other parts of the record.

We find no error in the judgment and it is affirmed.

Affirmed.

W. A. McCORMICK ET AL. v. JOHN P. SCHTRENCK.

Decided February 9, 1910.

1.—Tort—Offset.

An action for damages by one tort can not be offset by damages from another.

2.—Same—Assault.

In an action by a husband and wife for assault by defendant upon the latter, his plea in reconvention for damages by a subsequent assault on him by the husband was inadmissible and exceptions thereto should have been sustained.

3.—Evidence—Assault—Character.

In an action for damages by assault and battery, proof of the quarrelsome character of the party assaulted is admissible only on the issue of self-defense, and is confined to general reputation known to defendant.

4.—Assault—Provocation.

Offensive or exasperating words or conduct will not justify an assault. A charge which allowed plaintiff to recover only in case the assault was "unprovoked" was erroneous.

Appeal from the District Court of Caldwell County. Tried below before Hon. L. W. Moore.

E. B. Coopwood, for appellants.—An uncertain amount of damages arising from a tort can not be pleaded in offset to another uncertain amount of damages arising from another tort. Sayles' Civ. Stats., art. 754; Shook v. Peters, 59 Texas, 395; Smith v. Bates, 27 S. W., 1044; Duncan v. Magette, 25 Texas, 245; Hart v. Davis, 21 Texas, 411; Presnall v. McLeary, 50 S. W., 1066; 1 Ency. Ev., 1000; Knight v. Old, 2 Texas App. Civ., sec. 78.

In an action for damages growing out of an assault, evidence of the turbulent character or reputation, or quarrelsome disposition or aggressiveness when angry, or habit of indulging in violent, abusive and profane language, is not admissible either in mitigation of damages or as justifying the assault. Shook v. Peters, 59 Texas, 395; 3 Cyc., 1093, 1094, and authorities there cited; 1 Ency. Ev., 998, par. "F., Character and Condition of Parties."

No provocative acts, conduct, former insults, threats or words, no matter how offensive or exasperating, nor how much they may be calculated to excite or irritate, will justify an assault, nor will they excuse the wrongdoer. Jackson v. Wells, 13 Texas Civ. App., 275; 3 Cyc., 1077, par. 8, "Provocation," and authorities there cited in notes 5 and 6; 3 Cyc., 1096, (D) "Provocation," and authorities there cited under note 4.

A. B. Storey, for appellee.—The court did not err in overruling plaintiff's general and special exceptions, for the reason that much of the matter complained of was part of the transaction itself, and the balance was caused by, directly followed, and was incident to, the transaction, the basis of plaintiff's suit, and the law authorizes such pleas in defense as well as setoff. Rev. Stats., secs. 750, 754, 755; Castro v. Gentilley, 11 Texas, 30; Bradford v. Hamilton, 7 Texas, 55; Sterrett v. City of Houston, 14 Texas, 153; Phillips v. Patillo, 18 Texas, 518; Beckham v. Hunter, 37 Texas, 551; Brady v. Price, 19 Texas, 285; Texas & P. Ry. Co. v. Hurless, 1 Texas App. Civ., 306; Scott v. Texas Mex. Nat. Ry. Co., 18 S. W., 137; Sanders v. Bridges, 67 Texas, 93; Bodman v. Harris, 20 Texas, 31; Taylor v. Bewley, 93 Texas, 527.

If the court should conclude that it was error not to have stricken out appellee's action for damages, as set out in his answer, then in view of the evidence in the case, the charge of the court and the result of the trial, it was harmless error. 5 Current Law, 1620, 1640; Baum v. Corsicana Nat'l Bank, 75 S. W., 863; San Antonio & A. P. Ry. Co. v. Dolan, 85 S. W., 303; Sellers v. Savannah & F. W. Ry. Co., 51 S. E., 398.

Where the parties contradict each other in their testimony as to whether or not the appellant made the attack, and cursed and abused him, and that all he did was in self-defense against such attack, any evidence, direct or circumstantial, that will throw any light upon the question as to which contention was probably true is competent and probative. 3 Cyc., 1090; 16 Cyc., 1290.

The evidence was admissible, because the appellee plead justification and self-defense in what he did, and in all cases where such plea is made, the character or traits of character of the opposite party as a quarrelsome, aggressive or abusive person can be shown. 3 Cyc., 1090.

RICE, ASSOCIATE JUSTICE.—This suit was brought by McCormick and wife against defendant for the recovery of actual and exemplary damages for an assault alleged to have been committed by defendant upon Mrs. McCormick, resulting in serious injury to her.

The defendant, after demurrer and special exceptions, replied by plea of self-defense and by plea in reconvention, to recover against plaintiffs for actual and exemplary damages occasioned by and arising out of a subsequent assault alleged to have been committed by plaintiff, W. A. McCormick, on defendant, resulting in serious bodily injury to him.

By a supplemental petition appellants demurred generally to the allegations of appellee's plea in reconvention, and specially excepted

thereto, because the appellants' suit was for damages for an assault made by appellee upon Rosa McCormick, and the answer shows that the assault there set forth was made by W. A. McCormick, and that Rosa McCormick was in nowise responsible or liable for same or for damages thereby caused to appellee. The appellants likewise specially denied the allegations of appellee's plea in reconvention, and alleged that if W. A. McCormick did make an assault upon appellee, as therein charged, that the same was made at a different time and place than that made by appellee upon Rosa McCormick, did not grow out of same, was in nowise connected therewith, and was not incident thereto, averring that said assault and damages inflicted, if any, by W. A. McCormick, can not be pleaded in this suit for any purpose, either as justification or in mitigation, or as an offset or in reconvention.

The general demurrer and special exceptions so set up in appellants' supplemental petition were overruled, to which ruling they excepted.

Mrs. Rosa McCormick and appellee Schtrenck were members of the same church, living near each other in the vicinity of the church in the town of Luling. The former having occasion to go to the church on December 27, 1907, applied to Mrs. Schtrenck, wife of defendant, for the gate keys, which it seems was kept locked, and which were refused her, whereupon she went to the gate and broke the lock with a rock, and made an effort to get into the window of the church, when she was seen by defendant who had just come up. A quarrel arose between them with reference to breaking the lock, which eventuated in an assault by each upon the other, as shown from the evidence, and in which each received serious personal injuries. After they were separated it seems that W. A. McCormick, husband of Mrs. Rosa McCormick, ascertained what had occurred, and during the afternoon of the same day made an assault upon and seriously injured defendant Schtrenck, which fact formed the basis of the latter's plea in reconvention.

A jury trial resulted in a verdict in favor of defendant against plaintiffs on the original cause of action, and in favor of plaintiffs against defendant's plea in reconvention, and judgment was rendered in accordance with the verdict, from which plaintiffs have appealed, complaining by their first assignment of error that the court erred in not sustaining their exceptions to the defendant's plea in reconvention setting up the subsequent assault by plaintiff W. A. McCormick on appellee in reconvention and set-off, because one tort can not be set off against another.

We fully agree with appellants' contention that the court erred in not sustaining their exception to defendant's plea in reconvention. The question raised by this exception is not an open one in this State. It has frequently been held that, in an action for damages for tort, the defendant can not plead in set-off damages resulting from a tort previously committed by the plaintiff. Judge Roberts, in Hart v. Davis, 21 Texas, 411, in discussing a similar question, says:

"The question in this case is, can a tort be set off against a tort, as a libel against an assault and battery with a cowhide? To admit such a plea would establish the rule in effect that a trespass might be

justified by a previous libel, if the jury should think the injury inflicted by the libel and trespass about equal. Or, in other terms, it would permit one who was slandered to obtain his redress by an assault, instead of a suit, provided that he could establish that he had imposed no greater injury on the assaulted than had been done to him by the slander. The common law tolerates no rule which would permit such a retaliation of injuries. Indeed, the simplicity and directness of its remedies disallowed set-offs of any sort. It is consequently to other sources we must look for both the existence and extent of this remedy by set-off. Such a case as this is evidently not included in our statute of 'discounts and set-offs.' Hart, Dig., p 222. Though it has been held that equity will extend the remedy beyond the limits of the statute, still it never has been held, as is believed, to extend to a case of tort like the present."

In Shook v. Peters, 59 Texas, 393, the same principle is upheld, citing with approval the case of Hart v. Davis, *supra,* and where, as shown by the syllabus, it was held that a former malicious prosecution by the plaintiff of the defendant will not afford matter of defense to an action by plaintiff to recover damages claimed for personal injuries inflicted by an assault; nor can injury to defendant, resulting from such action, be pleaded in reconvention against the suit for damages.

It was shown from the evidence here that there were two separate and distinct assaults between different parties and occurring at different times; and, clearly, one can not be plead in reconvention as against the other. And this, we think, would be true, even if these separate assaults were between the same parties. The refusal to countenance such a procedure on the part of our courts is based upon the idea that it would be contrary to public policy to permit one who had committed an assault upon another, and against whom a civil prosecution had been instituted, to plead in off-set to the action that the plaintiff had committed a similar assault upon him on another occasion.

In Waterman on Trespass, sec. 123, p. 149, it is said: "One trespass can not be used as a set-off against another consequent upon it. In an action for an assault and battery the defendant can not set up as a defense an assault and battery committed upon him by the plaintiff just before the time of the assault complained of." See also Smith v. Bates, 27 S. W., 1044; Duncan v. Magette, 25 Texas, 245; Presnall v. McLeary, 50 S. W., 1066; Knight v. Old, 2 Texas App. Civ., sec. 78.

We sustain this assignment because we believe the court erred in overruling the general demurrer and special exceptions to appellee's plea in reconvention. This ruling likewise disposes of the questions raised by the second and third assignments of error.

On the trial, as shown by appellants' bills of exception, the court, over their objection, permitted the witnesses, Mrs. Jennie Myers and Mr. and Mrs. LaCrosse, to testify that they had been acquainted with Mrs. Rosa McCormick for many years, and that she was of violent temper and quarrelsome disposition, and when angry was in the habit of using violent, profane and abusive language, and was aggressive

when angry. This ruling is made the basis of appellants' fourth, fifth and sixth assignments of error, and it is contended by their propositions thereunder that, in an action for damages growing out of an assault, evidence of the turbulent character or reputation or quarrelsome disposition and aggressiveness when angry, or habit of indulging in violent, abusive or profane language, is not admissible in mitigation of the damages or as justifying the assault. It is not shown in this case that the defendant knew of this disposition on the part of the plaintiff; and there is positive testimony in the record that the defendant made the first assault upon Mrs. Rosa McCormick. It is true, there is evidence also in the record to the effect that she struck him first. We think that the evidence of her character in this respect should have been excluded. In Shook v. Peters, *supra,* the same question as here presented was discussed, and Judge Stayton, in passing upon it, says: "There being direct proof before the court as to the battery, it is not perceived that the court erred in refusing to admit evidence of the character of the plaintiff, and especially so, as it appears from the evidence that the plaintiff was unknown to the defendant, and he could not, therefore, have been influenced in his conduct by anything other than what occurred at the time of the battery, and what he had previously learned in reference to the treatment of his son."

In 3 Cyc., 1093-4, it is said with reference to the subject in hand: "The character and standing of the parties are pertinent in determining the amount of exemplary damages, but are not an element of compensation. Ordinarily evidence as to the character of defendant, his general reputation or the like, being irresponsive to the issues, is inadmissible in mitigation or augmentation of damages, especially where it is apparent that he was the aggressor; nor may defendant, to reduce or mitigate the damages, attack the character of the plaintiff or show his reputation for turbulence or his propensity to commit or provoke a breach of the peace; nor may plaintiff or defendant show that he himself is a man of good character or reputation. Where, however, justification by way of self-defense is pleaded, it is competent to show the character of the opposite party to be quarrelsome or otherwise, when such fact has been brought to the knowledge of the other party prior to the assault complained of." See also Ency. of Evid., vol. 1, p. 998, par. F. But if evidence of this character, under any of the conditions suggested by the authorities, should become admissible, then certainly it should be confined to the general reputation, and not to the personal opinion or knowledge of the particular witness, as was here allowed by the court. See Golder v. Lund, 50 Neb., 867, 70 N. W., 379. The assignments raising this question are, therefore, sustained.

The court in its general charge instructed the jury as follows: "If you find from the evidence that the defendant Schtrenck did make an unprovoked attack upon Mrs. McCormick, and did commit injury to her body, causing pain and suffering, you will find for the plaintiffs," etc.

This charge is assailed on the ground that no words, conduct or acts, no matter how offensive or exasperating, will justify an assault,

It seems to be the rule that conduct of this character may be given in mitigation of damages, but can not be regarded as a justification against an assault; so that, no matter if Mrs. McCormick did provoke the attack by insulting words and conduct, as contended by appellee, still she would not be estopped from recovery on account thereof, as the charge seems to indicate. See Jackson v. Wells, 13 Texas Civ. App., 275, 35 S. W., 528; 3 Cyc., p. 1077, par. 8, "Provocation," and authorities there cited in notes 5 and 6; 3 Cyc., p. 1096, (D) "Provocation," and authorities there cited under note 4. Hence, we conclude that the seventh assignment presenting this question should be sustained.

For the errors indicated the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

JAMES NEEDHAM v. AUSTIN ELECTRIC RAILWAY COMPANY.

Decided February 9, 1910.

1.—Jurisdiction—Appeal—Record.

To support the jurisdiction of the appellate court, it is necessary that the record show that the case was one within the jurisdiction of the court from which the appeal was taken.

2.—Same—Case Stated.

On appeal from a judgment of the County Court, plaintiff's petition, which was for the recovery of damages in the sum of $160, appeared to have been filed originally in Justice Court, but the record contained no transcript and appeal bond showing that the case was there tried and appealed to the County Court. Held, that it not being made to appear that the County Court had original jurisdiction over the cause of action, nor that it had acquired jurisdiction by appeal, the Court of Civil Appeals should, on its own motion, dismiss the appeal.

Appeal from the County Court of Travis County. Tried below before Hon. R. E. White.

Upon affidavit by appellant's counsel showing excuse for his failure to present a full record a rehearing was granted and the record perfected by certiorari, so as to show that jurisdiction of the County Court was obtained by appeal. The judgment was thereafter reversed and remanded in an opinion which has not been designated for publication.

Dowell & Dowell, for appellant.

R. L. Penn, Cochran & White and *Ireland Graves,* for appellee.

KEY, ASSOCIATE JUSTICE.—Though not suggested by either party, we are met at the threshold of this cause with a question of jurisdiction which requires the appeal to be dismissed. The plaintiff's petition discloses an action for damages, seeking to recover only $160,

an amount below the original jurisdiction of the County Court. The petition and the defendant's answer both appear to have been filed in a justice of the peace court prior to the time they were filed in the County Court, but there is no transcript and appeal bond from the Justice Court showing that the case had been there tried and an appeal perfected to the County Court. The Courts of Civil Appeals do not have jurisdiction of every civil case that may be tried by the inferior courts of this State.

By the Constitution and the statute enacted in pursuance thereof, the appellate jurisdiction of such courts is limited to cases of which the District and County Courts have original or appellate jurisdiction. There is another rule of law applicable to all Appellate Courts to the effect that it is necessary for a litigant who undertakes to prosecute an appeal to present a transcript which shows affirmatively that the Appellate Court has jurisdiction to entertain and consider the appeal. In view of that rule and the constitutional limitation of this court's jurisdiction to civil cases of which the District or County Court has jurisdiction, it is absolutely necessary, as a prerequisite to the jurisdiction of this court, for the transcript to show that the court from which the appeal is prosecuted had jurisdiction of the case; and when it is discovered that the transcript fails to show such jurisdictional facts, it becomes the duty of this court to dismiss the appeal. (Bomar v. Legg & Tindall, 101 S. W., 839, 46 Texas Civ. App., 176, and cases there cited.) In fact, it was held by our Supreme Court in Horan v. Wahrenberger, 9 Texas, 314, when there was no such constitutional limitation upon the jurisdiction of that court, that a judgment rendered by the Supreme Court in an appeal from a judgment rendered by the District Court in a case in which the latter court was without jurisdiction, was null and void. It was there held that, inasmuch as the District Court had no jurisdiction of the subject matter, that the appeal from its judgment to the Supreme Court did not confer upon that court jurisdiction, and therefore its judgment was a nullity.

If that be the correct general rule of law, then, most assuredly, when the Constitution limits appellate jurisdiction to such cases as the trial court has jurisdiction of, the Appellate Court can acquire no jurisdiction when the trial court was without jurisdiction. In the case at bar, as the amount in controversy is less than $200, the trial court did not have original jurisdiction. It might have acquired jurisdiction if the case was tried by and appealed from a justice of the peace court, but the transcript fails to show such state of facts.

This being the condition of the record, this court is without jurisdiction, and the appeal will be dismissed at appellant's cost.

Appeal dismissed.

WESTERN UNION TELEGRAPH COMPANY v. J. H. TIMMONS.

Decided February 9, 1910.

1.—Telegraph—Charge—Negligence—Causal Connection.

In an action for negligent failure to deliver a telegram, whereby plaintiff was prevented from attending a brother's funeral, the charge should require, as a condition for plaintiff's recovery, not only that negligence in the failure to deliver should be shown, but that if properly delivered plaintiff could and would have attended.

2.—Telegraph—Delivery—Negligence—Requested Specific Instructions.

A requested charge grouping the specific facts excusing a telegraph company for not delivering a message directed to one living, not at the place of address, but some miles in the country, where the company ascertained this fact, mailed the message to him, notified the sending office, and received no directions or compensation for extra expense necessary to make personal delivery, held improperly refused, though covered in general terms by the charge given.

3.—Telegraph—Notice of Claim for Damages.

A message was transmitted to the sending telegraph office by telephone and there written out on a blank containing a stipulation for notice within ninety days, of any claim for damages, which notice was not given. Plaintiff, the addressee, had no notice of this condition, and the office refused to give him a copy of the telegram on his request. Held, that it was a question of fact whether the defendant had waived the requirement of notice or plaintiff was bound thereby. A peremptory instruction to find for defendant because no notice of the claim was given was unwarranted.

4.—Brief.

An assignment of error not containing nor followed by a proposition showing ground for reversal will not be considered.

5.—Telegraph—Charge.

A telegraph company is required to use ordinary care with respect to the delivery of a message to one beyond free delivery limits. A charge requiring this would not be taken as imposing on it the duty to make personal delivery to one living in the country without payment therefor.

Appeal from the District Court of Coryell County. Tried below before Hon. John D. Robinson.

Geo. H. Fearons and *Clark, Yantis & Clark,* for appellant.—It was essential to a recovery that the plaintiff could and would have attended his brother's bedside or funeral. Western U. Tel. Co. v. May, 8 Texas Civ. App., 176; Western U. Tel. Co. v. Bell, 42 Texas Civ. App., 462; Western U. Tel. Co. v. Adams, 80 S. W., 93.

The defendant was entitled to have an affirmative charge upon the group of facts which it introduced in evidence to prove that its agents acted with ordinary care and were not guilty of negligence in attempting to deliver the message in question. Rev. Stats., art. 1317; Gulf, C. & S. F. Ry. Co. v. Mangham, 95 Texas, 413; Pelly v. Denison & S. Ry. Co., 78 S. W., 542; Texas & P. Ry. Co. v. Short, 58 S. W., 56; Missouri, K. & T. Ry. Co. v. McGlamory, 89 Texas, 635; Southern Const. Co. v. Hinkle, 89 S. W., 309; Yellow Pine Oil Co. v. Noble, 101 Texas, 125.

As the undisputed evidence showed that no written claim was ever presented, the defendant was entitled to have a peremptory charge given to the jury directing a verdict in its favor. Western U. Tel. Co. v. Sanders, 26 S. W., 734.

The defendant's agent at Gatesville having written the message at the request of the sender and his agents the telephone company employes, the sender and the plaintiff who affirms the contract by suing on it, are bound by the terms of the contract and the printed stipulations contained therein. Gulf, C. & S. F. Ry. Co. v. Geer, 5 Texas Civ. App., 349; Western U. Tel. Co. v. Edsall, 63 Texas, 668; Texas Telegraph & Telephone Co. v. Seiders, 9 Texas Civ. App., 431.

It was erroneous for the court to peremptorily charge that the defendant should deliver the message, although the plaintiff lived three and one-half or four miles in the country, and beyond the free delivery limits of the town of Rule. The contract could not be thus arbitrarily set aside by the court. Western U. Tel. Co. v. Jennings, 98 Texas, 465; Western U. Tel. Co. v. Taylor, 3 Texas Civ. App., 310.

No briefs for appellee were on file.

RICE, ASSOCIATE JUSTICE.—On the 25th day of April, 1907, Lee Timmons, brother of appellee, was seriously injured in an accident, from which he afterwards died; and at his request his father caused a telegram to be sent over appellant's lines to appellee at Rule, Texas, announcing that fact and requesting him to come at once, which message was never delivered. Lee Timmons died on the evening of the 27th of April, and was buried the next day. It was alleged by appellee that if he had received the message promptly he would have had ample time to reach his brother before his death and been present at his funeral, which he would have done, on account of which failure he sought to recover damages.

Appellant replied, as shown by its brief, by general denial and by a special plea to the effect that it exercised ordinary care to deliver said message, in that it transmitted same to the town of Rule within about an hour after its delivery to it for transmission, and that immediately upon receipt of same at Rule, it made diligent search for appellee, but learned that he lived several miles in the country; whereupon and within a very short time after the receipt of said message, the same was deposited in the postoffice at Rule, addressed to appellee. It further plead that the message was transmitted to it through the telephone company, whose agents were the agents of plaintiff in communicating said message to the defendant's agent at Gatesville, and while so acting as the agents of plaintiff that they knew and understood that the agent of defendant would write said message on one of the company's regular blanks for sending messages, which contained the usual stipulations relative to not delivering telegrams beyond the free delivery limits without extra charge, and also a stipulation to the effect that the company would not be liable for damages for failure to deliver, unless a written claim for damages was given within ninety days after the filing of said message for

transmission, and that in so writing said message on one of said blanks, the appellant's agents acted as agent of appellee. That said message so sent, on the back thereof, contained a stipulation to the effect that no message would be delivered beyond the free delivery limits without special charge made to cover the cost of such delivery, and that the company would not be liable for damages in any case where the claim was not presented in writing within ninety days after the filing of the message with the company for transmission. That notwithstanding that the message was addressed to the appellee at Rule, he in fact resided several miles in the country from Rule, which fact was unknown to appellant when it received said message for transmission, and that when it was ascertained by appellant"s agent at Rule that appellee resided several miles in the country, appellant's agent at Rule at once, about an hour after the message had been filed for transmission, sent a service message back to the original sender, to the effect that the message was not delivered because the party lived in the country, but that it had been mailed, and that the sender of said message after being so notified failed to pay or secure payment of the extra cost for delivering said message in the country to the appellee, and appellant was, therefore, not obliged to incur said extra cost. That appellee did not file within ninety days, or at any time, any written claim for damages for the failure to deliver said message, and that said stipulation in the contract was reasonable and not having been complied with, appellee was thereby debarred from recovery.

Appellee replied by supplemental petition, as shown by the brief, to the effect that he was not required to file any written claim for damages within ninety days from the date said message was filed for transmission with said company, for the reason that he had no actual knowledge that said message contained said ninety day stipulation, and that said appellant's agents refused and failed to deliver him a copy of said message, with the fraudulent intent to prevent him from ascertaining that he was so required to file the claim within ninety days, and that appellant had waived and was thereby estopped from enforcing said stipulation.

A jury trial resulted in a verdict and judgment for the appellee, from which this appeal is taken.

By its first assignment of error appellant insists that the court erred in the following charge to the jury: "Now, if you find from a preponderance of the evidence that on the 25th day of April, 1907, the defendant accepted for transmission and delivery a message, at Gatesville, Texas, to be delivered at Rule, Texas, and that said message was sent by J. M. Timmons to plaintiff, and that said message was sent for the benefit of plaintiff, telling him that Lee Timmons was very low and to come at once, and if you further find that said message was transmitted to Rule, Texas, by the defendant company but was not delivered to plaintiff, and if you further find that the defendant, its agents, servants and employes, in failing to deliver said message was guilty of negligence and failed to use ordinary care, as that term has been heretofore defined, and if you further find that such negligence and lack of ordinary care, if any, was the

direct and proximate cause of plaintiff's injury, if any, then if you so find you will find for the plaintiff and assess his damages as hereinafterward directed."

It is insisted that said charge is erroneous, among other reasons, because it directed the jury to find in favor of the plaintiff if the defendant was guilty of negligence in failing to promptly deliver the message, without also requiring the jury to find that if the plaintiff had received said message he would have gone to the bedside of his brother who was injured, or to his funeral, since unless he would have done so, no damage would have resulted by reason of any negligence of the defendant, and the plaintiff would not have been entitled to recover, because this was an essential ingredient of the plaintiff's cause of action. We are inclined to agree with appellant's contention, because in order to render appellant liable it is essential for the proof to show that if the plaintiff had received the message in time he not only could but he would have gone to see his brother, and this question is one of fact to be determined by the jury, which feature was entirely ignored in the charge given and complained of. See Western U. Tel. Co. v. May, 8 Texas Civ. App., 176, 27 S. W., 760; Western U. Tel. Co. v. Bell, 42 Texas Civ. App., 462, 92 S. W., 1036; Western U. Tel. Co. v. Adams, 80 S. W., 93. The charge as given, it will be seen, permitted a recovery if the jury should believe appellant was guilty of negligence in failing to deliver the message, notwithstanding they might also have believed that the plaintiff would not have responded to the telegram had it been delivered in time for him to have attended his brother during his illness. We therefore sustain this assignment.

The second assignment urges that the court erred in refusing to give appellant's special charge No. 6, which is as follows: "You are instructed that if you believe from the evidence that the defendant exercised ordinary care to promptly transmit the message in question to its agent at Rule, and that when it was received by the defendant's agent at Rule he went out in the town and made inquiries of various people for him and went to the hotel and looked and inquired for him and that he found out from some person in Rule that the plaintiff lived several miles in the country and that he then mailed said message a short time after he received it to the plaintiff by depositing it in the postoffice at Rule, addressed to plaintiff, and that he then on the same afternoon sent a service message to the plaintiff's agent at Ater and stated that the message was not delivered, that the party lived in the country and that he had mailed same; and if you believe that the defendant's said agent in so doing exercised such care as an ordinary prudent person would have exercised under the same or similar circumstances, then in case you so believe, you will return your verdict in favor of defendant."

The evidence disclosed that the operator, upon receipt of this message, made inquiry for the appellee about the town. Learning that he lived in the country some several miles away, he immediately mailed the message to him, and thereafter sent a service message to the appellee's agent at Ater, stating that the message was not delivered, that the party lived in the country and that he had mailed it

to him. It is the contention of appellant that it was entitled to have the facts presenting this feature of its defense grouped and presented to the jury, and that the main charge of the court failed to do this, hence that the court erred in refusing to give its special charge upon this subject. The court in its main charge gave the following on this subject: "And if you find that when said message was received at Rule, Texas, the defendant, its agents, servants and employes, knowing the importance of said message, acted with such ordinary care and diligence in attempting to deliver said message to plaintiff in person or by mailing the same to plaintiff's address at Rule, Texas, and if you find that in so doing the defendant, its agents, servants and employes exercised such care as an ordinary prudent person would have exercised under the same or similar circumstances, then in case you so find, you will return your verdict for the defendant."

It has frequently been held by our courts that a litigant is entitled to have the facts upon which he bases either his cause of action or defense so clearly and affirmatively grouped as to present the very matter upon which he relies for the determination of the jury; and that a failure to give a special charge so presenting them, in the absence of a similar presentation in the main charge, is error. It is said in Southern Const. Co. v. Hinkle, 89 S. W., 310: "That the defendant has the right to prepare and demand the giving of a special charge grouping the specific facts upon which he relies for a verdict in his favor, and that a general presentation of such issues by the court in the face of such special charge, although abstractly correct will not suffice, can not now be doubted."

Mr. Justice Brown, in Yellow Pine Oil Co. v. Noble, 101 Texas, 125, 105 S. W., 320, in discussing the refusal of a special charge grouping appellant's defense, says: "The charge as given by the court, in a general way, instructed the jury upon the issue, but the character of the evidence upon which the plaintiff in the case relied to show the nature of Noble's employment, and that he was engaged in the discharge of its duties, was such as to make the special charge requested by the defendant proper to be given by the court, and really necessary to present the defense which the oil company relied upon. It was important to the oil company that the facts detailed by its witness should be grouped and thus presented, calling attention of the jury to the facts upon which it relied to sustain the defense." See also the following cases sustaining the rule above announced: Gulf, C. & S. F. Ry. v. Mangham, 95 Texas, 413; Pelley v. Denison & S. Ry., 78 S. W., 542; Texas & P. Ry. v. Short, 58 S. W., 56; Missouri, K. & T. Ry. v. McGlamory, 89 Texas, 635, 35 S. W., 1058. See also Epperson v. International & G. N. R. R. Co., decided February 2, 1910, 125 S. W., 117, by this court.

We think the court erred in refusing to give this charge, and sustain the assignment complaining of its refusal.

Appellant in its third assignment complains of the refusal of the court to give a peremptory instruction requested by it to the effect that the evidence was insufficient to show waiver on its part of that clause requiring a written claim for damages to be filed within ninety days from the date of the filing of the message. The evidence

for the plaintiff showed that he made demand upon the appellant and its agents for this message, but they refused to deliver it to him or to let him see it, but simply read it to him. While the company undertakes to excuse its refusal and failure to deliver the message on the ground that the plaintiff had never paid anything for the message, nor did anyone guarantee the payment of anything for its delivery, still there is nothing in the evidence going to show that they had ever asked or demanded any pay from plaintiff therefor. We think, therefore, that there was sufficient evidence to have required the presentation of this issue to the jury, and hence the special charge was properly refused. See Western Union Tel. Co. v. Sanders, 26 S. W., 734. Until plaintiff had the opportunity of seeing the message and knowing its contents, as well as the stipulation requiring him to present his claim for damages within the ninety days, he certainly could not be held to have forfeited his right by reason of a stipulation he knew nothing of, and which the company itself, as shown by the proof, prevented him from ascertaining.

The eighth assignment is not briefed in accordance with the rules, as it contains no proposition. We therefore decline to consider it.

The ninth assignment complains of the following charge given by the court to the jury: "You are further charged that it was the duty of the defendant to use ordinary care and diligence in the delivery of said message after receiving the same for transmission and delivery, whether the same was to be delivered within or without the free delivery limits of the town of Rule, Texas." It is in effect urged that this charge is erroneous, first, because no notice was given to appellant that the plaintiff lived beyond the free delivery limits established for said town when said message was accepted for transmission; second, because by contract it was not obligated to deliver said message beyond the free delivery limits, unless the extra cost was paid for making said delivery; and, third, because the charge, in effect, directed the jury that it was appellant's duty to exercise ordinary care to deliver said message beyond the free delivery limits of the town, even at the expense of extra cost to it therefor. When considered in connection with the other portions of the main charge, we do not think any of said objections are well taken, because, irrespective of what the contract may have been relative to an extra charge in the event that the party should live beyond the free delivery limits, we are inclined to believe that appellant rested under the duty at least of exercising ordinary care and diligence to deliver said message, which was all in fact that the charge required to be done. Under this charge the jury could not have believed that it was the duty of appellant to send a messenger for its delivery into the country without the payment of said expense, but might have found that it was its duty to do something else in the exercise of ordinary care and diligence in an effort to deliver the message. We therefore overrule the ninth assignment of error complaining of this charge.

As the remaining assignments complain of the insufficiency of the

evidence to support the verdict, we deem it unnecessary to discuss same.

For the errors indicated, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

JOSEPH SARRO v. BASCOM BELL.

Decided February 9, 1910.

1.—Brief—Assignment of Error—Irrelevant Proposition.

A proposition that the court erred in excluding the testimony of certain witnesses, is not germane to an assignment of error that the court erred in instructing a verdict for the appellee, and therefore can not be considered on appeal.

2.—Trespass to Try Title—Partition—Rents—Pleading—Judgment.

In a suit of trespass to try title to an undivided half interest in an improved town lot, the plaintiff prayed for judgment for his interest in the lot, for partition, rents, damages, etc.; the defendant answered by plea of not guilty; the court instructed the jury to return a verdict for the plaintiff for an undivided half interest in the property, and for one-half its reasonable rental value, and judgment was entered accordingly; on appeal the defendant did not complain of the judgment in so far as it adjudicated to the plaintiff an undivided one-half of the property, but only of the judgment for one-half the rents. Held, the property involved in the adjudication of the title necessarily included the improvements on the land, and in the absence of an attack on the judgment as to the title, the court properly rendered judgment for the rental value of the entire property, land and improvements; and this, though it was uncontradicted that the improvements were all made by the defendant and gave the property its rental value. The defendant should have plead his equity.

3.—Attorney and Client—Testimony not Privileged.

The testimony of an attorney to the effect that his client understood an ex parte deposition made by him, would not be subject to the objection that it was a confidential communication.

Appeal from the District Court of Bexar County. Tried below before Hon. J. L. Camp.

J. D. Childs, for appellant.

Clark & Bliss, for appellee.

JAMES, CHIEF JUSTICE.—Appellee brought this action by a petition in trespass to try title for the title to an undivided half of a lot in the city of San Antonio, and prayed, upon appropriate allegations, for judgment for such interest in the premises, for partition, and for rents and damages, etc. Defendant's answer was, not guilty. The court directed the jury to return a verdict for plaintiff for an undivided half interest in the property, and for one-half of the reasonable rental value thereof from May 14, 1906, to the time of trial.

Appellant's first assignment of error is that the court erred in peremptorily instructing the jury as was done. The first proposition under this assignment is that the court should not have excluded

certain testimony of three witnesses. This proposition can not be considered under the assignment of error. The assignment alleges error in the giving of the peremptory charge, which means that, on the testimony introduced, the charge was improper. If appellant desired to present errors committed by the court in excluding certain testimony, the only way to present such matter for revision was to complain of them by assignments. We would be going out of our way and committing error ourselves, if we gave effect to this proposition.

The second proposition is that "defendant having testified that the real estate in controversy was bought and paid for by himself and all improvements erected thereon by his own skill, labor and capital (which testimony was not controverted by plaintiff) the plaintiff was therefore not entitled to any part of the rents and profits of said property, and the trial court, in instructing the jury to find for plaintiff one-half of the rental value of the said property and in receiving the verdict finding for plaintiff $140 for rent and in rendering judgment thereon, committed affirmative error."

The above proposition does not complain of the decree in so far as it adjudicates to plaintiff the title to an undivided half of the property. There is nothing in this brief, so presented as to enable us to consider it, which authorizes us to disturb the judgment concerning the title, and the property involved in the adjudication of the title necessarily includes the improvements. The proposition merely complains of the judgment awarding plaintiff a recovery of one-half the rental value of the property. If plaintiff acquired title to an undivided half of the lot and improvements by his deed, it follows he is entitled to half the rental value of same during the time defendant has appropriated the rents to the exclusion of plaintiff, as all the evidence shows he has done since plaintiff acquired his interest.

The contention is based on the testimony that the improvements were placed on the lot back about 1891 by defendant with his own means, and it may be stated that it was these improvements which gave the place its rental value. But we do not see how we can give defendant any relief based on his having erected the improvements, when we are confronted in the same connection with a judgment which we can not revise, and which determines the title to half of the lot with improvements to be in plaintiff.

The second and third assignments of error complain of the court's permitting S. E. Eldridge to testify as to whether or not the appellant, Joseph Sarro, understood a deposition given by him *ex parte*, the objections being, first, that Mr. Eldridge, acting as Sarro's attorney at the time, could not testify to confidential communications; and, second, that his testimony consisted of conclusions.

Appellant Sarro, after his *ex parte* deposition was read, testified in substance that he didn't understand it all and that they (referring among others to Eldridge, his attorney), just said, sign; that the facts in the deposition are not true—they made him sign. Mr. Eldridge told him to sign it and he signed it; that he afterwards discharged Eldridge and got another lawyer, etc. There was nothing in the nature of a confidential communication involved in the testi-

mony of Eldridge, and particularly so under the above circumstances. The objection that his testimony consisted of conclusions was properly not sustained.

In addition, if defendant was equitably entitled to an allowance for the improvements and the rents growing out of the same, this is a matter that should have been claimed by his pleading. Affirmed.

Affirmed.

Writ of error refused.

T. J. FREEMAN, Receiver, v. E. A. NICKELS.

Decided February 9, 1910.

Damages—Charge—Affirmative Presentation of Defense—Practice.

The issue being whether or not the disabilities of which plaintiff complained, in a suit for damages for personal injuries, were caused by a derailment of defendant's railroad train or from other causes, a charge which required the jury to find from the evidence that plaintiff's disabilities were directly caused by said derailment before they could return a verdict for the plaintiff, was a sufficient presentation of the defense plead by defendant, and the issue joined, in the absence of a requested instruction to return a verdict for defendant if the plaintiff was not injured by the derailment.

Appeal from the District Court of Bexar County. Tried below before Hon. A. W. Seeligson.

King & Morris and *Hicks & Hicks,* for appellant.—Where the pleadings of the defendant allege facts which, if found by the jury, constitute a complete defense to plaintiff's action, and there is evidence to support such allegations, it is the duty of the court to submit such defenses in his main charge to the jury, and it is error for the court to submit merely the plaintiff's side of the case and entirely ignore the defenses set up in the allegations of defendant. Sharman v. Newsome, 46 Texas Civ. App., 111; Tyler Ice Co. v. Tyler Water Co., 42 Texas Civ. App., 210; Aetna Ins. Co. v. Brannon, 101 S. W., 1020.

H. C. Carter and *Perry J. Lewis,* for appellee.

JAMES, CHIEF JUSTICE.—The action was brought by appellee to recover damages for personal injuries alleged to have been received by him while a passenger on one of appellant's trains by a derailment thereof through defendant's negligence.

The defendant pleaded general denial, also admitting the derailment and that plaintiff was a passenger on the derailed train, but denying that it knew the cause of the derailment, or that it was due to defendant's negligence; and also denying that plaintiff received injuries by reason of said derailment; but that his infirmities, whatever they be, were due to old age or some other cause than from injuries received in said derailment. The verdict recovered was for $7500.

The court in his charge did not submit in direct terms to find for defendant if appellee was not injured by the derailment, nor if the

disabilities he complained of were due to his old age or to causes other than from injuries received in the derailment. This is complained of as error by appellant's first assignment of error. The submission was as follows:

"If you believe from the evidence that on or about the 19th day of March, 1908, plaintiff was a passenger on one of defendant's trains; and you further believe from the evidence that said train was wrecked and derailed, as alleged in plaintiff's petition; and you further believe from the evidence that such wreck and derailment, if any, were directly caused by defendant's negligence, if any, as alleged in plaintiff's petition; and you further believe from the evidence that by reason of such wreck and derailment, if any, and such negligence, if any, that plaintiff directly received any of the injuries alleged in his petition, then I charge you that your verdict must be for the plaintiff."

As, under this charge, the jury were required to find from the evidence that plaintiff directly received the injuries complained of by him by reason of said derailment before finding for plaintiff, the defenses referred to were not ignored. Defendant was entitled to a more particular presentation of these matters to the jury, but did not request it.

The rest of appellant's brief deals with the verdict, alleging it to be excessive in amount. The examination of the testimony leads to the conclusion that the sum awarded was not clearly out of proportion to the injuries and damages sustained, although plaintiff was 67 years of age. Judgment affirmed.

Affirmed.

Writ of error refused.

CHARLES O. AUSTIN V. JACKSON TRUST & SAVINGS BANK.

Decided February 9, 1910.

1.—Limitation—New Cause of Action—Name of Defendant—Change of Initial, Immaterial.

The action being against the endorser of a promissory note, the filing of an amended petition for the purpose of correcting an error in the original petition in the initials of the name of the maker, will not constitute a new cause of action against which the statute of limitation might be pleaded. A change in the initials of the defendant's name did not change the original cause of action.

2.—Evidence—Abandoned Pleadings.

In proper cases abandoned pleadings are competent evidence against the pleader.

3.—Practice—Improper Evidence—Harmless, when.

No matter how objectionable the testimony of a certain witness might be, it can not be cause for reversal when the testimony of other witnesses to the same effect is admitted without objection, and especially so when the appellant himself testifies to the same effect.

Appeal from the District Court of Bexar County. Tried below before Hon. A. W. Seeligson.

C. L. Bass, for appellant.

R. P. Ingrum, for appellee.

FLY, ASSOCIATE JUSTICE.—Appellee sued appellant on a note for $2500 executed by R. G. Root to H. H. Hamilton, which was endorsed and transferred to appellee by appellant, who waived notice, demand and protest. It was alleged that the maker, the payee, and J. A. Felthous, an indorser, were insolvent and nonresidents of Texas; that the note was presented when due to the maker for payment which was refused and that it was duly protested. Appellant excepted to the second amended petition, upon which the cause was tried, on the ground that it set up a new cause of action which was barred by four years limitation, and pleaded a counterclaim of $3000 for services rendered to appellee. The cause was tried by jury and resulted in a verdict for appellee for $2500 and interest, and for appellant for $750 for compensation for his services, and the court rendered a judgment for appellee for $2485.80, being the amount found for appellee, less the $750 found for appellant. We find that the evidence sustains the verdict of the jury.

The first assignment of error complains of the action of the court in overruling the special exception setting up limitation, the allegation, which it is contended set up a new cause of action, being that appellee had stated in its former pleading that the note was executed by P. G. Root, when it should have been R. G. Root. The assignment can not be sustained. The change of an initial in the name of the maker of the note did not change the original cause of action, which was founded on an indorsement of a $2500 note by appellant. The initials were descriptive and formal, and an amendment of them did not go to the cause of action. Pridgen v. McLean, 12 Texas, 420; Thouvenin v. Lea, 26 Texas, 614; Williams v. Huling, 43 Texas, 113; McIlhenny v. Lee, 43 Texas, 205; Lee v. Boutwell, 44 Texas, 151; Kendall v. Riley, 45 Texas, 20; Thompson v. Swearengin, 48 Texas, 555; Rabb v. Rogers, 67 Texas, 335; Gordon v. Mackey (Texas Civ. App.), 30 S. W., 586.

The court admitted in evidence an abandoned answer filed by appellant, which is complained of in the second assignment of error. It was stated by appellee that the pleading was introduced to show that it contained certain defenses not made before that time. We see no particular reason why the answer should have been used as evidence, but we do not believe its use could have injured appellant, for the reason that one of the defenses set up therein was sustained by the jury and a verdict rendered in favor of appellant for the services that he alleged he performed. The answer may have been permissible in connection with subsequent amended answers that were introduced in evidence, without objection, to show that appellant was from time to time augmenting and increasing his claims for services rendered by him. Abandoned pleadings are permissible in evidence against the pleader. Barret v. Featherstone, 89 Texas, 567; Houston, E. & W. T. Ry. v. DeWalt, 96 Texas, 121.

Appellant through his third assignment of error complains of the

admission in evidence of the testimony of A. M. Rode as to an entry in the discount register of appellee, which entry the witness had made in the book. The evidence was objected to on the ground that it should have been first shown that the book was without the jurisdiction of the court or destroyed, or that it was in a book of accounts kept by the witness himself. The witness did, according to the last theory advanced by appellant, qualify himself to testify to the contents of the book. All that was proved by the entry, sworn to by the witness, was that appellee purchased from appellant the note of R. G. Root, and that it was endorsed by Hamilton, Felthous and appellant, and the amount paid for the note. All of those matters were proved by other testimony, and in fact all of it was admitted by appellant in his testimony. No matter how objectionable the evidence of Rode may have been, it could not have prejudiced appellant and the objection to it is without any practical value.

There is no error presented in the brief that would justify a reversal, and the judgment will be affirmed.

Affirmed.

Writ of error refused.

No. 362. F. M. HUBBELL, INTERVENER, v. TEXAS SOUTHERN RAILWAY COMPANY ET AL.

No. 363. ORIENT TRUST COMPANY v. ST. LOUIS UNION TRUST COMPANY ET AL.

No. 405. ST. LOUIS UNION TRUST COMPANY v. TEXAS SOUTHERN RAILWAY COMPANY ET AL.

Decided February 10, 1910.

Appeals from the District Court of Harrison County. Tried below before Hon. W. C. Buford.

Numerous appeals were perfected by various parties and interveners from the judgment of the District Court directing distribution of the funds in the hands of the receiver of the Texas Southern Railway Company, arising from sale of its property under mortgage foreclosure.

The several cases were consolidated and the five opinions following dispose of the various questions involved.

No. 405. ST. LOUIS UNION TRUST COMPANY v. TEXAS SOUTHERN RAILWAY COMPANY ET AL.

Receivers—Certificates—Operating Expenses—Costs—Priority of Payment.

A railway in the hands of a receiver, sold under foreclosure of a mortgage securing its bonds after having been operated by the receiver at a loss, failed to bring enough to pay claims for expenses of its operation, of various kinds, and the receiver's certificates issued under authority of the court for money borrowed to discharge liens of laborers and material men. Held:

(1) Various claims, such as for fuel, car rentals, rentals of terminal facilities, loss of cars and freight by fire, labor, rolling stock, traffic balances due other roads, injuries in person or property by the receivers' torts, etc., are

held properly adjudged by the court to be expenses of operation and given precedence in payment over the claims of the bondholders.

(2) The proceeds of special property of others sold by the receiver and of special funds deposited with him, such as by shippers for cotton concentration, converted by the receiver and used in the operation of the road, gave rise to claims for torts of the receiver similar to demands arising out of negligence in operation and were properly given precedence as operating expenses over the claims of bondholders.

(3) Claims of operating expenses have precedence of payment out of the net profits of operation; and if these are wanting or insufficient the court may give them precedence over bondholders as to payment out of the corpus of the property on sale; but this is not a right given by operation of law and is dependent on the order of the court fixing precedence.

(4) The priority of payment as between claims for operating expenses and those for receivers' certificates for money borrowed, is controlled and determined by the orders of the court classifying claims and ordering the issuance of the certificates.

(5) An order of foreclosure and sale of a railway in the hands of a receiver classified the claims as follows: A, operating expenses payable from the earnings, and these failing, payable first from the proceeds of sale of the property. Other claims were assigned to classes B., C., D., and E. and given priority of payment out of the proceeds of sale in that order. To class B. certain labor liens, and to class C. certain material men's liens, to class D. bonded indebtedness, and to class E. unsecured indebtedness, all arising prior to the receivership, were assigned by the same order, and jurisdiction was reserved to adjudicate other demands. Sale under the order was not made for some four years, the receiver continuing to operate the road. Meantime receiver's certificates to the amount of $150,000 were issued and sold under order of the court for money to pay claims originating before the receivership, allowed and assigned to classes B. and C. and the certificates given a first lien on the property with the same classification as the claims they were sold to pay. Such order gave priority of payment over the receiver's certificate to claims for operating expenses of the receiver, which were by the previous decree, which constituted the final judgment in the case, assigned to class A. The order authorizing the certificates recited a necessity for paying the claims before a sale of the road, contemplating its continued operation and the incurring of future operating expenses having precedence over the certificates, of which the purchasers were bound to take notice.

(6) An order to the receiver to make no more improvements and confine operating expenses to 80 percent of the gross earnings was a mere economic direction to the receiver not affecting the validity or classification of claims of persons thereafter furnishing supplies or labor to the receiver as fixed by a previous judgment of foreclosure and classification.

(7) Having fixed in its order of foreclosure, which was the final judgment and not set aside, the classification of existing claims and of those to arise from future operation, it was error for the court to refuse afterwards to direct their payment in accordance with such classification.

(8) An order classifying claims of certain interveners for debts of operation did not prejudice the rights of the holders of receiver's certificates which by the terms of the court's judgment had been postponed in their lien to operating expenses.

(9) An order fixing the salaries of the receiver and his attorney and the master in chancery may be modified by subsequent interlocutory orders allowing extra compensation, and persons whose claims were postponed to those of the cost of receivership have no ground of complaint because the salary first fixed was exceeded.

(10) The clerk of the court could be paid, as part of the costs of the receivership, for special services performed by him and not required by law as part of his official duties.

(11) Persons furnishing supplies for the operation of the road are not estopped from claiming precedence of payment over receiver's certificates by their knowledge of and failure to object to their issuance.

M. B. Templeton, for St. Louis Union Trust Co.—The orders di-

recting and authorizing the issuance of certificates declared and adjudicated that the same were and should be secured by first lien upon all the property of the said Texas Southern Railway Company, and said orders, judgments and decrees were final in their character and not appealed from, and hence were binding upon the court and all other parties. Kampmann v. Sullivan, 26 Texas Civ. App., 308; McIlhenny v. Binz, 80 Texas, 1; Sullivan v. Texas Briquette & Coal Co. (Sup. Ct.), 94 Texas, 541; Waters-Pierce Oil Co. v. U. S. & Mexican Trust Co., 44 Texas Civ. App., 397; Gregg v. Metropolitan, 197 U. S., 183; Mittenberger v. Logansport, 106 U. S., 286; Wallace v. Loomis, 97 U. S., 146; Union Trust Co. v. Midland R. R., 117 U. S., 436; Fosdick v. Scholl, 99 U. S., 251; Central Trust Co. v. Wabash R. R., 46 Am. & Eng. R. R. Cases, 301; Kneeland v. Luce, 141 U. S., 491; Fidelity Ins. Co. v. Shenandoah Valley R. R. Co., 38 Am. & Eng. R. R. Cases, 560; Giles v. Stanton, 86 Texas, 620; Trust Co. v. Grant Loc. Works, 135 U. S., 225.

The decree of the court directing the issuance of receiver's certificates, having been made with the knowledge, acquiescence and consent of all parties then interested in the subject matter, is conclusive and binding as to them, as well as parties whose debts accrued after said decrees. Kampmann v. Sullivan, 26 Texas Civ. App., 308; Humphreys v. Allen, 4 Am. & Eng. R. R. Cases, 1; Union Trust Co. v. Midland R. Co., 117 U. S., 434.

The court had a right to authorize (as he did) the payment of current claims, wages, labor, etc. Giles v. Stanton, 86 Texas, 620; Ellis v. Vernon Water Co., 86 Texas, 109; Union Trust Co. v. Ill. Mid. R. R. Co., 117 U. S., 434.

A. N. Gossett, F. H. Prendergast, T. S. Miller and *A. H. McKnight,* for Orient Trust Company.—A final judgment rendered by the court at one term can not be changed or modified by the court at a subsequent term. Rev. Stats. art. 1339; Hedgecoxe v. Com'r, 43 S. W., 322; Petrucio v. Seardon, 76 Texas, 539; Laclede Bank v. Betterton, 5 Texas Civ. App., 355; United States & Mex. Tr. Co. v. Young, 46 Texas Civ. App., 117; Re Woerishoffer, 75 Fed., 335, 21 C. C. A., 375.

The decree of September 21, 1904, except as express reservations of jurisdiction and control were made therein, was a final judgment. It settled the primary rights of the parties, leaving detail to be adjudicated under the reservation. Western Sup. & Manuf. Co. v. United States & Mexican Tr. Co., 41 Texas Civ. App., 478; Central Trust Co. v. Grant, 135 U. S., 224; Central Trust Co. v. Madden, 17 C. C. A., 236; Re Woerishoffer, 21 C. C. A., 375.

The order of June 20, 1907, was made as a final judgment fixing the plaintiff's status as to its allowances in accordance with the original decree and fixed the amounts of such allowances up to that time and so far as the court could fix the same. Jones v. United States & Mex. Tr. Co., 47 Texas Civ. App., 430; Western Sup. & Mfg. Co. v. United States & Mex. Co., 41 Texas Civ. App., 478; Trustees v. Greenough, 105 U. S., 527; Williams v. Morgan, 111 U. S., 684; Re Woerishoffer, 21 C. C. A., 375; Gordon v. Newman, 10

C. C. A., 587; Central Trust Co. v. Madden, 17 C. C. A., 236; Petersburg Co. v. Dellatorre, 17 C. C. A., 310; Alderson on Receivers, sec. 613, p. 834.

The receiver's certificates, having no higher standing than that given them by the orders of the court pursuant to which they were issued, are subject to the final adjudications of the decree of September 22, 1904, and all further final adjudications made thereunder, including the allowance decree of June 20, 1907. Anderson v. Condict, 35 C. C. A., 335; Bank of Commerce v. Central C. & C. Co., 115 Fed., 878; Jones on Corporate Bonds and Mortgages, sec. 556; Alderson on Receivers, secs. 333, 340, 342 and 343, p. 470; Short on Railway Mortgages, sec. 690.

Purchasers of receiver's certificates are parties to the suit and as such must take notice of the progress of the case and the proceedings therein. Parish v. Alston, 65 Texas, 197; Bridgens v. West, 35 Texas Civ. App., 277; J. W. West Lumber Co. v. Lyon, 53 Texas Civ. App., 648; Gordon v. Newman, 10 C. C. A., 587; Anderson v. Condict, 35 C. C. A., 334; Columbus Ry. Co. Appeals, 48 C. C. A., 275; Bank of Commerce v. Central C. & C. Co., 53 C. C. A., 334; Re Woerishoffer, 21 C. C. A., 375; Petersburgh Ry. Co. v. Delatorre, 17 C. C. A., 310.

The plaintiff's action and its expenses and its attorneys and counsel services inured to the common benefit and use of all such persons, and, as such plaintiff, the appellant is entitled to payment out of the trust fund. United States & Mex. Trust Co. v. Young, 46 Texas Civ. App., 117; Jones v. U. S. & Mex. Trust Co., 47 Texas Civ. App., 430; Byrne v. First Nat. Bk. of Lake Charles, 20 Texas Civ. App., 194; Trustees v. Greenough, 105 U. S., 527; Central Ry. Co. v. Pettus, 113 U. S., 116; Cowdery v. Railway Co., 93 U. S., 352; Tompkins v. Chester Mills, 90 Fed., 39; Trust Co. v. Spartanburg Ry. Co., 97 Fed., 409; Sloan v. Mitchell, 18 C. C. A., 443.

C. E. Carter, for appellee, S. P. Jones.—The order of the court below, dated September 21, 1906, was a mere office order, and was subject to modification by the consent of the court and appellee. Texas L. & L. Co. v. Winter, 93 Texas, 560; Halbert v. Alford, 16 S. W., 814; Freeman on Judg., secs. 15, 29, 32 (A), 121, 142, 251; Black, Judg., vol. 1, sec. 308, page 384; vol. 2, 509 and 695; Perkins v. Fourniquet, 6 How., 209; Elwell v. Johnson, 74 N. Y., 80; Bank v. Lynch, 76 N. Y., 514; Kerchner v. Wood, 48 Mich., 199; Rose v. Gibson, 71 Ala., 35; Gage v. Eich, 56 Ill., 297; 13 Am. & Eng. Ency. Law (2d ed.), 24-25, and cases cited; Aetna Ins. Co. v. McCormick, 20 Wis., 265; Powell v. Jopling, 2 Jones (N. C.), 400; Wilson v. Tarbett, 3 Stew. (Ala.), 296, 21 Am. Dec., 637; McQuire v. Drew, 83 Cal., 225; Smith v. Shawhan, 37 Iowa, 533; Sellers v. Union Lumb. Co., 36 Wis., 398; Matter of Rose, 80 Cal., 166; Bentley v. Jones, 4 How. Pr., 335; Nolton v. Western Ry. Corp., 10 How. Pr., 97. "Orders" are not regarded as res adjudicata with same strictness as judgments. Union M. F. N. Bank v. Clark, 42 Hun, 92.

An order declaring amount of salary to receiver and solicitor is

within the control of the court, and may be modified or rescinded. State v. Alabama Ry. Co., 54 Ala. 139. The court may modify orders upon its own motion. Ryon v. Thomas, 104 Ind., 53; Barth v. Rosenfield, 36 Md., 604; Dabbs v. Dabbs, 27 Ala., 646; Cook v. Bay, 4 How. (Miss.), 485; Waring v. Turton, 44 Md., 535; Davis v. Roberts, 1 Smed. & M. (Miss.), 543; Kimball v. Alcorn, 45 Miss., 145; Ashe v. Moore, 2 Murph. (N. C.), 383; Roberts v. Cocke, 1 Rand. (Va.), 122; Commonwealth v. Beaumarchis, 3 Call. (Va.), 22; Topp v. Pollard, 24 Miss., 682; Miller v. Justice, 86 N. C., 26.

Burgess, Hill & Burgess, for McAlester Fuel Co. and Oklahoma Fuel Co.—The validity of the receiver's certificates depends entirely upon the order of the court authorizing their issuance; such order must be strictly construed, and certificates issued for any other purpose than that stated in the order are invalid and are not obligations against the estate in the receiver's hands. And the receiver's certificates held by the trust company were issued to pay off classes B and C claims and were by the terms of the order under which they were issued, made to take the place of said classes B and C claims, and to stand in the place and stead thereof. Stanton v. Alabama & C. R. Co., 31 Fed., 587; Fidelity Ins. & S. D. Co. v. Shenandah Iron Co., 42 Fed., 377; 24 Am. & Eng. Ency. of Law (2d ed.), 41; High on Receivers (1886), sec. 358d; Beach on Receivers (1891), sec. 384; Beach on Receivers (1897), sec. 406; Thompson on Corporations (1894) sec. 7183; Ellis v. Vernon Ice L. & W. Co., 86 Texas, 110; International & G. N. Ry. Co. v. Coolidge, 26 Texas Civ. App., 595; McIlhenny v. Binz, 80 Texas, 13; Missouri, K. & T. Ry. v. McFadden, 89 Texas, 138; Waters-Pierce Oil Co. v. U. S. Mex. Trust Co., 44 Texas Civ. App., 397; Beach on Receivers (1897), sec. 388; 24 Am. & Eng. Enc. of Law, vol. 24, page 30. The classification made by the court in this receivership was approved in U. S. Mex. Trust Co. v. Western S. & M. Co., 109 S. W., 377.

The rule is that the expense of administering and preserving the property is to be charged first upon the net income, and if that be not sufficient, then upon the property itself. Ellis v. Vernon Ice L. & W. Co., 86 Texas, 110; McIlhenny v. Binz, 80 Texas, 13; Anderson v. Condict, 93 Fed., 353; New York S. & T. Co. v. Louisville Ry., 102 Fed., 389-90.

T. W. Davidson, Mell & Stephens and *Warren & Briggs,* for interveners John Jones, R. D. Drigger, Albert Pippin, Jos. Hahn, Sr., Linus Oney, J. T. Jones, Gentry Hills Lumber Company, City of Marshall, Vickers & Brown, Southern Fuel Co., W. R. Smith, M. P. Green, S. C. Hort, John Wimbry, W. L. Whitley, Will Wilson, Paul Smith, A. A. Mattox, J. W. Robertson, Fred Easterwood, T. H. Oliver. It was error on the part of the court to class these receivers' certificates in the same class with the liabilities of the receiver. Rev. Stats., arts. 1472, 1475; Phillips v. Wise, 31 S. W., 428; Espuela L. & C. Co. v. Bindle, 11 Texas Civ. App., 262; Howe v. St. Clair, 8 Texas Civ. App., 101; International & G. N. Ry. Co. v. Coolidge,

26 Texas Civ. App., 595; Union Trust Co. v. Illinois Midland, 114 U. S., 457; Thomas v. Western Car Co., 149 U. S., 110; Missouri, K. & T. Ry. Co. v. McFadden, 89 Texas, 138.

M. P. McGee, for Y. D. Harrison, Master in Chancery, intervener. —The order fixing the master's compensation is nothing more or less than a temporary or interlocutory order, and was subject to modification by the court, or subject to be rescinded by the court at any time during the pendency of the receivership. Union F. M. N. Bank v. Clark, 42 Hun, 92; State v. Alabama Ry. Co., 54 Ala., 139; Ryon v. Thomas, 104 Ind., 53; Dabbs v. Dabbs, 27 Ala., 646

F. H. Prendergast, for interveners, Chicago & A. Ry. Co., Atchison, T. & S. F. Ry. Co., Midland Val. Ry. Co., Kansas City S. Ry. Co., Missouri P. Ry. Co., Chicago, R. I. & P. Ry. Co., Chicago, R. I. & G. Ry. Co., Chicago, B. & Q. Ry. Co., New York, N. H. & H. Ry. Co., Southern Pacific Co. and Western Supply & Mfg. Co.

C. E. Carter, for Wm. C. Johnson & Sons Mach. Co.

Carey Abney, for Collin County Mill & Elv. Co.

Young & Stinchcomb, for C. L. Taylor, receiver.—The fact that the court had set a salary for the receiver was only an order within the control of the court and not a final judgment; it was subject to modification or change, and the setting of a final compensation for his services was not due to be made until after his services had been rendered. Texas L. & L. Co. v. Winter, 93 Texas, 560; Freeman on Judgments, secs. 15, 29, 32 (A), 121, 142, 251; 1 Black on Judgments (1st ed.), sec. 308, p. 384, vol. 2, pp. 509 and 695; State v. Alabama Ry. Co., 54 Ala., 139; Ryan v. Thomas, 104 Ind., 53; In re Angell, 91 N. W., 611; Maxwell v. Wilmington, 82 Fed., 214; Ruggles v. Patten, 74 C. C. A., 450; Merchants Bank v. Coysler, 14 C. C. A., 444; Beach on Receivers, p. 834.

The same counsel filed brief for Herman Loeb, upon cotton concentration claim.

Chilton & Chilton, for J. W. Ogburn.

Y. D. Harrison, for Kniffin Fuel Co.

LEVY, ASSOCIATE JUSTICE.—Many intervening applications or motions of creditors were filed asking for orders of the court directing payment of their claims out of the fund realized from the sale of the railway properties under decree of foreclosure. More than twenty-five appeals were perfected from the ruling of the court, and there are numerous persons made appellees who file cross-assignments. The record is very voluminous, and it is only attempted to state such pertinent parts as are absolutely necessary to a proper disposition of the appeal.

The records show that the Texas Southern Railway is a line of railway approximately seventy-two miles in length, running through

Harrison, Upshur and Wood Counties. On July 11, 1904, the United States & Mexican Trust Company, its name having since been changed to the Orient Trust Company, commenced this action in the District Court of Harrison County against the defendant, the Texas Southern Railway Company, to foreclose a certain mortgage given by the railway company to it as trustee to secure bonds of said railway company. Before this suit was brought R. L. Jennings and W. A. Chatterton, general creditors of the railway company, each brought suit against it on debts and for appointment of a receiver. Such two other cases were consolidated with the case of the United States & Mexican Trust Company, but no hearing on either the Chatterton or Jennings application for receiver was had, but their claims were adjudicated. A receiver was appointed on the application of the said trust company. Its petition alleged the execution of the mortgage and bonds, and default in the payment of the same. It then alleged a request of the holder of the majority of the bonds that the trust company as trustee should foreclose the mortgage; alleged default and breach of conditions of the mortgage, and that the railway company was insolvent and unable to pay its floating debt and current accruing indebtedness and wages of operatives, and that the railway company owed a large amount of such wages and its current expenses which it was wholly unable to pay; that its net revenues were insufficient, and that it was indebted to various persons upon prior liens and matters unsecured by lien, and was in arrears for the payment of wages of its employes for at least six months. The prayer of the petition was for foreclosure of the mortgage and that the mortgaged property of the railroad be ordered sold and that the proceeds be applied to the payment of its debts, including allowances for the trustee's disbursements and expenses as trustee, including its attorney and counsel fees and reasonable allowances for its personal services as trustee; and upon foreclosure, after paying all the taxes and prior liens on the property, which it prayed to have ascertained, that the residue be applied to the payment of the bonds and that a receiver be appointed. On this petition the court appointed S. P. Jones as receiver July 11, 1904, and in the order of appointment defined his powers, among other things, as follows: "(1) Said receiver is hereby directed to take on the 11th day of July, 1904, possession of all the mortgaged property as herein provided, and to preserve and protect all of said mortgaged property, acting in all things under the order of this court. . . . (3) The receiver is directed to pay all balance due or to become due to other railroads, or transportation companies, growing out of the exchange of traffic. (4) Said receiver is further ordered and directed to pay all taxes on said mortgaged property as the same shall mature, and also all of the current expenses growing out of the operation and maintenance of the said road, and to collect all the revenues thereof."

On September 22, 1904, a final judgment was rendered by the court fixing the status of debts and the character of debts to be paid in preference out of proceeds of sale, and foreclosing the mortgage and appointing and directing P. M. Young a special commissioner to make sale of the mortgaged property under said decree. The

decree directed sale to be made on the first Tuesday in December, 1904. For want of bidders at that time there was a failure of sale. A subsequent date of sale was fixed by order of the court. From and after the failure to sell in December, 1904, the court continued to operate the road under the receivership as he did before the order of sale. S. P. Jones resigning as receiver, C. L. Taylor was on October 1, 1906, appointed as his successor, and continued to operate the road, under order of the court, until its sale. On the 15th day of August, 1908, a date fixed by the court, the Texas Southern Railway properties were sold under the final decree of foreclosure of 1904, and at such sale the railway properties were bought in, by the highest bidder, for the sum of $286,000. The sale was confirmed by the court. At the time of the sale there was outstanding indebtedness, which had been actually incurred by the receiver subsequent to his appointment and during his receivership in the necessary operation and preservation of the property, in the aggregate sum of about $110,000. This indebtedness incurred by the receiver consisted, topically arranged, of accounts unpaid and owing as taxes, machinery appliances and material, fuel, labor performed, traffic balances due other railway companies, rental of engines and cars, repairs to cars, freight and passenger overcharges, loss and damage to freight and cars by operation and by fire, cotton concentration charges prepaid by shippers, claims and judgments to persons and property, stationery and printing, bridge-timber and ties, rent of terminal facilities, court costs in suits, and salaries of the receiver and master in chancery, attorney's fees, and incidental expenses in the operation. There were also due allowances by the court to court officers in the receivership. There was also due on the receiver's certificates held and owned by the St. Louis Union Trust Company, as principal and interest, approximately $191,000. There was also due about $33,000 on a judgment in favor of F. M. Hubbell on vendor's lien notes against certain of the right of way. There was also due a substantial moneyed judgment against the railway company with a lien on the property in favor of the Orient Trust Company, plaintiff in the action, for its attorney's fees and compensation as contracted to be paid in the deed of trust. There were other items of indebtedness, not incurred by the receiver and not complained of in this appeal. Besides all of this indebtedness there was the indebtedness of the bonds, to secure which the mortgage on the railway properties was executed. The aggregate amount of indebtedness at the time of the sale, exclusive of the bonded indebtedness and the indebtedness of the railway company not here complained of, exceeded the fund realized from the sale of the railway properties approximately $71,000. At the October term, 1908, following the sale of the road, the court, after setting a day of the term for such hearing, proceeded to try the various motions or interventions of the creditors for payment of their claims out of the fund of the sale. On November 21, 1908, the court entered its order on such motions, and the appeal is from such order.

After stating the case.—The contention here is between creditors

of the receiver having demands growing out of and incident to the necessary operation of the road by him as receiver, and the holders of receiver's certificates. Specifications of error, by assignments and cross-assignments, challenge the orders of the court made, on the intervening motions or applications filed for orders for payment out of the proceeds of sale of the railway properties, in directing payment out of proceeds of such sale of the receiver's certificates held by the appellant trust company on equality and in the same class with operating expenses incurred by the receiver as such during his management and control of the railway. The certificate holders make the contention that by the terms of the order of the court authorizing the issuance of these certificates they had a first lien upon all the proceeds of the sale of the railway properties, and hence were entitled to be paid out of such fund in priority to the operating expenses incurred by the receiver. Such creditors of the receiver contend that they are entitled to be paid out of such fund in rank and priority ahead of the certificate holders, and that their legal and equitable right for such rank and priority rests upon express decree of the court fixing the primary right and status and rank in the final decree of foreclosure and sale of the railway. The specification of error stated, which is based on proper assignment, involves the determination of whether all the claims of the creditors mentioned are properly entitled to be classed as operating expenses of the receiver. The court makes the findings that such creditors are the creditors of the receiver, "and that such debts were all contracted and created during the receivership and are just charges against the same for the respective amounts therein set forth, and that all of said debts grew out of and were incident to the operation of the road in the hands of said receiver." These debts of the receiver incurred by the receiver in his necessary operation of the road covered, it appears, the last twelve or fifteen months of its operation. The finding by the court is admitted by the record. Such debts consisted, topically arranged, of fuel, car repairs, supplies and material, car rentals, rentals of terminal facilities, loss and damage to freight and cars by fire and by operation, costs of depositions in suits, shop machinery, hospital account, board due section men, insurance on property, overcharges in freight shipments, certain taxes, cotton concentration charges prepaid by shippers, stationery and printing, ties and bridge-timber, labor, traffic balances due other railroads, and claims and judgments for killing stock and for personal injuries. The items for fuel and car rentals constitute the bulk of this indebtedness. It can not be said, as a matter of law, that the several demands mentioned did not grow out of and are not expenses necessarily incident to operation of the railroad. The following are entitled to be legally classed as items of operating expenses: Car rentals, Kneeland v. American L. & T. Co., 136 U. S., 89; Thomas v. Western Car Co., 149 U. S., 95. Cars destroyed by fire, see Grand Trunk Ry. Co. v. Central Vt. Ry. Co., 88 Fed., 636. Rolling stock, equipment and traffic balances due other roads, Miltenberger v. Logansport Ry. Co., 106 U. S., 286. Damages for injuries to persons or property during receivership caused by torts of the servants

of the receiver, Ryan v. Hayes, 62 Texas, 49; Green v. Coast Line Ry. Co., 24 S. E., 814; 24 Am. & Eng. Ency. Law, p. 31; see Anderson v. Condict, 93 Fed., 349; South Carolina & G. Ry. Co. v. Carolina, C. G. & C. Ry. Co., ibid., 543. The nature of the claim of the Western Supply Company, a claim in this list of demands, is stated in the appeal of that case in 109 S. W., 377. That portion of this claim adjudicated in class A as a demand against the receiver is here. The court ordered the receiver in that case to take the supply company's rails and sell them, and the receiver did so and then used the proceeds in the operation of the road. The cotton concentration claims, as they are called in the record, of Loeb and others, are of the same class as the claims above mentioned. The receiver used these special funds deposited with him by these parties in the operation of the road. As a tort of the receiver as such the court had the power and was warranted in classifying these several demands as charges of the receivership and payable as such out of the corpus sale. A judgment against a receiver for his conversion of special funds of individuals in his possession as receiver into operating expenses of the road is as much entitled to be classed and paid as a charge of the receivership as are demands based on negligence from operation. The nature of the demands is the same. It appears from the record, and is admitted, that the fund realized from the sale of the railway properties under the decree of foreclosure was insufficient to pay in full all creditors entitled to participate in its distribution ahead of the bondholders. The bondholders do not appeal, and make no contention here. The court made the finding, and the fact is admitted, that during the operation of the road by the receiver, which was under orders of the court, the operation did not earn or make any net earnings, and that in the actual operation of the road by the receiver a net loss was incurred by him over and above the revenues of the operation of the road. In the light of the authorities it is the settled general rule of law that the court has the power, as regards indebtedness incurred by the receiver himself as necessary operating expenses of the railway while in his custody, as in this case, where the receiver's income proves insufficient to satisfy his indebtedness, as shown by the record in this case, to direct the payment of the residue out of the proceeds of the foreclosure sale before a distribution is made to creditors and lienholders of the railway company. Alderson on Receivers, sec. 320; High on Receivers, sec. 394b; 24 Am. & Eng. Ency. Law, p. 30; 3 Cook on Corporations, sec. 875; 1 Elliott on Railroads, sec. 580; 5 Thompson on Corporations, 7119; Ellis v. Vernon Light Co., 86 Texas, 109, 23 S. W., 858; McIlhenny v. Binz, 80 Texas, 1, 13 S. W., 655; Union Trust Co. v. Midland Ry. Co., 117 U. S., 437; Kneeland v. American L. & T. Co., 136 U. S., 92; Kneeland v. Bass, 140 U. S., 592.

In the case of Ellis v. Vernon Light Co., supra, our Supreme Court says: "Accordingly, the rule is that the expenses of administering and preserving the property is to be charged, first, upon the net income; and if that be not sufficient, then upon the property itself or its proceeds upon sale." Further, in the case of McIlhenny v.

Binz, supra, the court uses this language: "The expenses of operating the railroad while in the hands of the receiver have been uniformly allowed, and it would seem that as to claims of this class there should never have been any serious difficulty. Being the expenses of administering the trust fund, they should be a first charge upon its funds, and should be awarded priority of payment." But it is to be understood that this rule only admits and concedes the equitable power of the court to direct the payment of such character of indebtedness out of the proceeds of sale. It is not to be understood that the right of such creditors of the receiver to be preferred and paid out of the corpus sale arises by operation of law and independent of the order of the court. On the contrary, the right of such creditors of the receiver, for claims of operating expenses, to be preferred in prior payment to lienholders out of the proceeds of sale of the corpus, flows from an equitable situation and arises from the order of the court so to be preferred and paid, and does not arise by operation of law. High on Receivers, sec. 394b; Alderson on Receivers, sec. 328; Missouri, K. & T. Ry. Co. v. McFadden, 89 Texas, 138, 33 S. W., 854.

In the latter case our Supreme Court uses this language: "The court appointing a receiver to take charge of and control a railroad may make the liabilities incurred by him a charge upon the corpus of the property, and upon sale may direct their payment from its proceeds; but the charge so created proceeds from the order of the court, and does not arise by operation of law." This reduces the question, as between the certificate holders and such named creditors of the receiver, as to whether in this case the receiver's operating expenses should be paid out of the proceeds of the sale of the properties of equal and common rank or in priority of the certificates. The question, as between themselves, must necessarily be determined under the record in the case from the decree and orders of the court made in respect thereto. The decree and order of the court that must control and determine the question between them are, we think, the final decree of foreclosure and the order authorizing the issuance of the certificates. As only one final judgment can be made in the case, the decree of foreclosure, under which the sale occurred, must be held to be the final judgment in the case. Such decree was not set aside or vacated, but executed by an order of sale, and there was no complaint by the parties in respect thereto. This decree of foreclosure, as later discussed, expressly fixed and determined the primary right and rank and class that the character of claims against the receivership and the property were to occupy and have in regard to payment out of the proceeds of sale, and expressly fixed and determined the class that operating expenses of the receiver were to occupy and have in such distribution of the proceeds of sale, failing the sufficiency of income by operation. The order of the court authorizing the issuance of the receiver's certificates also expressly fixed and determined and graded the class and status, as later discussed, that the certificates were to have and occupy in regard to their payment out of the proceeds of sale. The sale of the property was had under such decree, and the sale was confirmed by the court, and title was

ordered made to the purchasers of the road. This decree of foreclosure being final, there is involved the power of the court thereafter to set aside such classification that the various characters of indebtedness were to have, there being no proceedings to set aside or vacate such previous decree. The order of the court from which the appeal is taken therefore, as between the certificate holders and the receiver's operating expenses named, to be regarded and considered in this appeal as being an order, within his power, denying the motion of each of such creditors to have his indebtedness placed for payment in the proper class previously determined that such character of indebtedness should have and occupy in payment out of the proceeds of sale.

As before stated, it must be held in this case, we think, that the decree of foreclosure as finally made by the court expressly fixed the rank and classified for payment out of the proceeds of sale as a preferred indebtedness the operating expenses of the receiver in this case. The decree recites: "And for purposes of convenient classification in this decree and proceedings thereunder of the rank and order of priority of their respective liens and rights to payment from the earnings of the receiver and proceeds of the sale of the mortgaged properties, it is now ordered that such persons and their demands be and they are now classified as follows: (1) Class 'A,' in which are included and classified the persons and demands entitled to be paid from the earnings of the receiver, as part of his operating expenses and charges, and failing the sufficiency of same then first from the proceeds of the sale aforesaid; (2) class 'B,' in which are included and classified those next entitled to be paid from the proceeds of said sale; (3) class 'C,' in which are included those next entitled to be paid from the proceeds of the sale remaining after payment of the above classes." The other classes, D. and E, are not set out, as not material at this point.

In pursuance of this classification in this decree, there were adjudged and assigned to their respective classes, the following: To class A claims amounting to $70, which the receiver was ordered to pay out of the earnings as a part of his operating expenses; to class B a large number of labor liens, owing by the railway company prior to the receivership, were adjudicated and assigned, aggregating $81,500; to class C a large number of materialmen's liens, owing before the receivership, aggregating $27,500; to class D the bonded indebtedness to secure which the mortgage was given; to class E a large amount of unsecured indebtedness of the railway incurred prior to the receivership. Reservation of jurisdiction was made in the decree, for purposes of making adjudication of demands pending and not then adjudicated, and those that might thereafter be filed. The decree further directs sale of the mortgaged property, and then provides: "It is further ordered, adjudged and decreed that out of the proceeds of said sale there shall be paid, so far as same shall suffice (1), the costs and expenses of this action, including any and all allowances that the court may hereafter make and order; (2) the liens allowed and classified in class 'B,' as hereinbefore provided,

shall next be paid; (3) the demands allowed and classified in class 'C,' as hereinbefore, shall next be paid."

But the other classes are not here set out, as immaterial. The receiver's certificates here represent these B and C claims. This decree directed sale of the mortgaged property to be made on the first Tuesday in December, 1904. It appears that the sale failed for want of bidders at such sale. After this failure to sell the road then the court issued its order for issuance of these certificates in question. The record shows that various subsequent dates of sale were fixed by the court. The original decree was never set aside, and sale under the decree occurred on the first Tuesday in August, 1908. It appearing that the court in the final decree of foreclosure had finally classified and fixed the rank and priority of operating expenses of the receiver, payable out of the proceeds of sale, in class A as a preferred indebtedness, the next question then is, did the subsequent order of the court authorizing the issuance of certificates by its terms so change or modify this particular classification in the decree as to reduce the indebtedness of the character of operating expenses of the receiver to a lower status, or prefer the certificates to such character of indebtedness? If such was not the legal effect and force of the order, and we think it was not, then it follows as a fact conclusively shown in the record that the final decree of foreclosure was not changed or modified by the court as to classification of claims and rank of payment. The sale having failed to occur for want of a bidder, the court on the 21st of December, 1904, in vacation, upon application of the receiver duly made, authorized the receiver to issue and sell for the purpose of paying said indebtedness then due to laborers and to mechanics and materialmen, which indebtedness accrued prior to the appointment of the receiver and which had been classified in the decree as classes B and C, $150,000 of receiver's certificates. On February 6, 1905, it being the regular term of the court, an order was entered approving and confirming the vacation order as to receiver's certificates, and the certificates were issued and sold by the receiver, and the proceeds thereof received by him. The order directing the issuance of the certificates recites: "And it appearing to the court that there are a large number of debts due to laborers who labored for the Texas Southern Railway Company before the receiver in this case was appointed, and it also appearing that there are a large number of debts due for supplies and materials furnished the Texas Southern Railway Company, accruing before the receiver in this case was appointed, and which have heretofore been heard by the court and classified as being in class 'B' and class 'C' which are prior liens to the bonds sued on, and so adjudged by the court; and it further appearing to the court that it is very necessary to pay all of such creditors at an earlier date than a foreclosure sale can be had, it is, therefore, ordered and decreed by the court that S. P. Jones, receiver herein, be and is hereby empowered and authorized to borrow money in a sum not to exceed $150,000, as may be necessary to pay said claims in class 'B' and class 'C,' and for which said sum of money to issue receiver's certificates or debentures to bear interest at the rate of six percent per annum

from this date until paid, and said interest to be paid semiannually and to be so stated on the face of said certificates. . . . It is further ordered that the certificates or debentures when issued shall become and hereby declared to be a first lien upon all the railway, franchises, property and rights of the defendant, the Texas Southern Railway Company, including all of the constructed railroad, rolling stock, equipment, right of way, tools, machinery, appliances and appurtenances thereto belonging, and all other property of every kind, character and description, wherever situated, the said certificates to be the same in legal force, effect and standing and dignity as the laborer's liens and material liens under the Texas statutes, and in the foreclosure sale of said railway under the decree of foreclosure in said sale, and shall stand in the place and in the stead of class 'B' and class 'C' claims, and shall be payable out of the proceeds of said sale, with preference and priority the same as the claims in class 'B' and class 'C' would be, which said certificates hereby authorized represent and are used as a form of payment of."

All these certificates were approved by the Railway Commission of Texas (art. 4584h, Rev. Stats.), and sold to the appellant, and have ever since been held and owned by it. The power of the court to authorize issuance of certificates for this character of railway indebtedness is not here questioned, if indeed it could properly be. It is a settled rule of law that receiver's certificates, being the creation of the court, have just the effect, and are of no further or greater effect than given by the order of the court authorizing the issuance thereof, and purchasers of the certificates are charged with notice of the provisions of such order. Alderson on Receivers, secs. 333-40-42-43; 5 Thompson on Corporations, 7183; High on Receivers, sec. 398c; 3 Cook on Corporations, sec. 877; 1 Elliott on Railroads, secs. 592-5; see Gordon v. Newman, 62 Fed., 686; In re Woerishoffer, 75 Fed., 335; Anderson v. Condict, 93 Fed., 349; Bank of Commerce v. Central Coal Co., 115 Fed., 878. It must be conceded, as it is, that the order of the court authorizing the issuance of the certificates created a lien in favor of the certificate holders on the railway property. But the question here is not, we think, whether a lien was created by the order, but whether the certificates, by the terms of the order authorizing their issuance, are made payable out of the proceeds of sale first before the payment of the operating expenses incurred by the receiver in the operation of the road while in his custody. Emphasis and stress is placed by the certificate holders upon the words "first lien" in the order. The order, we think, must be construed as a whole, and not in part, in order to give it its proper effect. It is evident, we think, that such order of the court properly construed means to give, and did give, such character and extent of lien and upon the same terms to the certificates as would maintain and continue such prior rights to the certificates as theretofore provided in the final decree of foreclosure for labor and material liens that they were used as a form of payment of, and to rank and classify the certificates as payable out of the proceeds of sale in the same rank and priority and class theretofore given such indebtedness of B and C claims, which was first as to the mortgage

bonds, but not in preference above or exclusive to all claims for operating expenses incurred by the receiver in class A. The order recites "a first lien . . . in legal force, effect and standing and dignity as the laborer's liens and materialmen's liens under the Texas statutes . . . which said certificates hereby authorized represent and are used as a form of payment of."

The order expressly recites its purpose and object to be to authorize the issuance of the certificates as a means of paying off the labor and material liens "heretofore heard by the court and classified as being in class 'B' and 'C,' which are prior liens to the bonds sued on, and so adjudged by the court." Such order expressly provides as to the plane and rank the certificates should occupy and extend as a lien on the proceeds of the sale, "and in the foreclosure sale of said railway under the decree of foreclosure in said cause, and shall stand in the place and stead of class 'B' and 'C' claims, and shall be payable out of the proceeds of said sale, with preference and priority to the same as the claims in class 'B' and 'C' would be, which said certificates hereby authorized represent and are used as a form of payment of." All of which language clearly imports and means that the court did not intend to give and fix such lien for the certificates as meaning without intervening liens or claims whatsoever between it and the fund of the sale. The distinctions between this case and other cases in which the lien of the receiver's certificates was not limited or was otherwise limited may clearly and readily be observed. It is quite unnecessary to cite authorities to support the statement that if a receiver's certificate is issued generally, it stands in the same class as the receiver's general obligations. It is also a well understood principle of law that if certificates are issued with a limited liability, and payable only in a certain way and rank, they can be payable in no other way. 3 Elliott on Railroads, at p. 3140. See Anderson v. Condict, supra.

The effect of the order in the instant case was, as much so as if the very words in the above case were used, to grant to the certificates a lien paramount to the mortgage in suit, subject, however, to the payment of "operating expenses and charges" of the receiver. Certificates may be subordinate to other claims against the receiver. International & G. N. Ry. Co. v. Coolidge, 26 Texas Civ. App., 595, 62 S. W., 1097. There is a clear distinguishment between the instant case and Kampmann v. Sullivan, 26 Texas Civ. App., 308, 63 S. W., 173, cited. The order in the latter case recited, "It is ordered that the said three certificates shall be a first lien upon the entire property." Here the order recites, "shall become and are hereby declared to be a first lien upon the railway and property . . . in legal force, effect and standing and dignity as the laborer's liens and material liens under the Texas statute . . . which these certificates represent and are used as a form of payment of." Further, the order in that case provided for preferred payment as "and shall be given priority in payment over any other liens or debts of any and every class or kind now existing or that may hereinafter arise . . . while this receivership is pending." The very terms of such order made the preferred payment exclusive and superior to operat-

ing expenses and other claims of the receiver. In the instant case the certificates were classified in rank and preference of payment as "and in the foreclosure sale of said railway *under the decree of foreclosure in said sale* the certificates to stand in the place and stead of class 'B' and class 'C' claims, *and payable* out of the proceeds of said sale with *preference and priority the same* as the claims in class 'B' and 'C' would be, which these said certificates represent and are used as a form of payment of." It is the exclusive terms of the order in the Kampmann case, it is seen, that is the controlling feature of the case. The opinion says creditors "extended credit to the insolvent railroad after the order of the court fixing the lien of the receiver's certificates had been made, and are chargeable with full notice of such lien." By this it was evidently meant to rule that because of the exclusive terms of the certificate order subsequent creditors of the receiver could not claim an equitable standing in priority of the certificates. It would have been inequitable for such creditors to be preferred to the certificates. The opinion expressly states that "no order of the court was ever entered giving the gas company any preference lien," and further it appears that the only classification or order the court made on such creditors was subsequent to the issuance of the certificates. In the instant case receiver's expenses, and their being paid out of the corpus failing the sufficiency of the income of operation, were sanctioned by the court in advance of the issuance of the certificates. The equities of the two cases are essentially different.

The order of the court authorizing the issuance of the certificates in question recites "that it is very necessary to pay all of said creditors at an earlier date than a foreclosure sale can be had." The sale of the road under foreclosure having failed for want of bidders, it must be assumed by such recital that the court, the railway being in the control and under the operation of the court through a receiver, contemplated and intended at the time that such operation would continue for an indefinite time. The holders of the certificates, it must be held, took them with such knowledge, and in contemplation that the road would be so operated under orders of the court, and that the court had the power so to do "although said continued operation may involve the danger of some loss." (Ellis v. Light Co., supra.) The previous classification in the decree of foreclosure, looking to an early sale, was existing and not modified at the time of the order made for certificates. This classification specifically provided that "operating expenses and charges" of the receiver should be paid in preference of other debts from the proceeds of sale, failing the sufficiency of the income of operation. Finding that it was contemplated and intended that the road should be continued to be operated by the receiver, and that the previous order of the court directing payment of the residue of operating expenses in class A as a preferred debt out of the proceeds of sale was retained and continued in force by the court at the time of his order for certificates, and that the court's order for certificates limited the certificates to payment, after operating expenses and charges, in classes B and C, it follows, we think, that it must be ruled that the court

not only intended to reserve the power to prefer the expenses and charges of operation which it would assume, but did expressly exercise such power of preferment at the time by the terms of the order authorizing the certificates. If the receiver's expenses of operation, and their being paid out of the corpus failing the sufficiency of the income of operation, were sanctioned by the court, as it was in the decree, in advance of issuance of the certificates, then the fact that the earnings of operation failed to meet all necessary expenses and charges incident to running the road, and that such class of debts constitute a large amount of money, is not referable as a reason or ground in aid of the advancement of the certificates to a rank above such operating expenses and charges. The court having the power to continue the operation, such loss, arising from operation, must be attributable solely to practical results of the venture or chance of operation. The certificate holders contemplating the operation of the road took the certificates, in the terms of the order authorizing their issuance, subject to such practical results of loss in operation.

The court during the time of the operation of the road entered an order directed to the receiver to cease making improvements, and that no further expenditures be made except strictly operation and repairs, "and the receiver is especially ordered and instructed that said operation expense shall not exceed eighty percent of the gross earnings per month of the said railroad." This order was made a year after the order for the certificates. The trial court makes the finding that this order "was intended only as an economic order directed against the receiver only, and was not intended and did not operate against the creditors of the said receivership who thereafter furnished goods, wares, labor or supplies in good faith to said receivership, and that said order did not have the effect of postponing any of the debts in payment, as equity should require, in the event the eighty percent was insufficient to pay all of the operating expenses, and I find that all such debts and obligations contracted by the receiver, since said order, are not in the least affected by said order as to payment out of the proceeds of sale of the property." The certificate holders' contention in respect to this order is overruled. The rights and standing of the certificates were fixed and determined by the order of the court authorizing the certificates, which was prior to the order in question. The order was economic, and directed by the court against the receiver, and not intended, as the court finds, to operate against the creditors who thereafter furnished goods, wares, labor or supplies in good faith to said receivership.

The certificates for $7000 issued under the order of September 21, 1905, are not questioned here by a specific assignment of error, and they are left in the classification placed by the court, along with the operating expenses. These certificates are based on a different order of the court, which recites that they were issued to enable the receiver to purchase certain rolling stock as necessary to the operation of the road.

The trial court having found that all the claims in question, classed as operating expenses, were just charges and were operating expenses of the receiver as such, it having previously classified such character

of claims in rank and priority of payment out of the proceeds of sale in preference to the certificates in question, and having limited the receiver's certificates to payment after such operating expenses and charges were paid, it was error, we think, to refuse the motion to direct their proper payment as previously classified and ordered. This ruling disposes of assignments Nos. 1, 2, 3, 4, 11, 12 and 16 of the St. Louis Union Trust Company, certificate holders, and the assignments and cross-assignments of McAlester Fuel Company, and many others too numerous to specify.

The seventh and tenth assignments of the St. Louis Union Trust Company are overruled. As before stated, the rights of claimants to pay for operating debts were fixed by the decree of record, and the rights and standing of the certificates were fixed and determined by the order of the court authorizing the same. Consequently, the *nunc pro tunc* entry of the practical order complained of did not legally operate to the prejudice of the rights of the certificates, and is not reversible error.

The St. Louis Union Trust Company by its thirteenth, fourteenth, fifteenth, seventeenth, eighteenth, twentieth, twenty-first and twenty-second assignments presents for error certain allowances made by the court to each the attorney for the receiver, to the master in chancery and to the receiver, and directing their payment as "court costs." The court at the time of the appointment of this receiver and his attorney entered an order providing for compensation, payable monthly. The same kind of order was entered as to the pay of the master in chancery. After sale and confirmation, and on application therefor, and upon proof, the court made additional and final allowances to these officers out of the proceeds of sale. It is the contention of the certificate holders that these previous orders of the court as to salary were conclusive, and that other allowances were unwarranted by law. The court on much proof determined the amounts of the allowances, and finds they were reasonable and the services performed were worth the amounts. We can not say, as a matter of law, that the allowances are unreasonable or excessive. The court specially finds as to the previous order declaring salary to the attorney Jones, that it was not intended by such order and its entry to cover and include compensation to him for services in certain suits and character of litigations then pending against the receivership, and that such salary did not include pay to him for services in such suits, and that the present additional allowances were as compensation entirely for services in respect to these cases and trials. If the court had the power, and it must be ruled he did, when he came to finally dispose of the receivership cause, to modify former interlocutory orders as to pay of officers of the court and to render such final orders for pay to its officers as in his opinion the rights and services of such parties demanded as proper, then no reversible error or complaint, the allowances being proper and reasonable, could be predicated on the exercise of such power by the court, and the discussion need not proceed further. The former order of the court declaring salary, payable monthly, was an order within the control of the court and not conclusive as a final judgment, it must be ruled, and was subject to

modification by the court, and the court had complete power to modify and enlarge same. State v. Alabama & Chat. Ry. Co., 54 Ala., 139; Farmers L. & T. Co. v. Central Ry. Co., 8 Fed., 60; In re Angell, 91 N. W., 611; 1 Black on Judgments, sec. 308; Ibid., vol. 2, 509, 695; Beach on Receivers, 834; High on Receivers, sec. 783. And see Texas L. & L. Co. v. Winter, 93 Texas, 560, 57 S. W., 39. It was in the sound discretion of the court to make the extra allowances at all. The court having made such allowances, it was properly within his power to direct their payment out of the proceeds of sale as "court costs." Louisville, E. & St. L. Ry. Co. v. Wilson, 138 U. S., 501. This ruling disposes of all the assignments mentioned.

By the nineteenth assignment it is contended that there was error in making allowance to C. F. Adams, clerk of the court, in the sum of $300. The proposition is, "It is contrary to the law and public policy to make extra allowance for care of papers, trouble and annoyance" to the clerk of the court, whose fees are fixed by law. There are no findings of the court in this respect, and we are unable to say upon what precise ground the allowance was made by the court. We must, as is proper, indulge the presumption that the allowance was upon grounds and for a claim authorized by law, in order to support the judgment. Referring to the application of Mr. Adams, it is there alleged that he was specially appointed by the court as custodian of the purchase price of the railway property and to assist the commissioner of sale in the proper disbursement of the money. This was a special duty in the case, and not among his regular duties required of him by law as clerk; and if the allowance was to pay for such special and independent duties, as we must assume it was in the absence of a contrary finding by the court, the allowance was not illegal.

The sixth assignment of the appellant trust company presents error as to the allowance of the claim of F. M. Hubbell, called the "Kern Equipment," on a pro rata basis with the certificates. This question is disposed of against appellant in the ruling in the appeal of Hubbell this day decided and here referred to.

The eighth and ninth assignments of the appellant trust company present error as to allowance of the demands of Hubbell for engine and tie notes, as they are called, as items of receiver's obligations on equality of payment with its certificates. The court's findings that these claims were necessary operating expenses, as purchase of engines and ties, they were proper items to be allowed as operating expenses and to be paid as such. Estoppel of prior payment could not be predicated or effectuated. The assignments are overruled.

The fifth assignment of appellant trust company presents error as to allowance of the "vendor's lien" demand, as it is called, of Hubbell on equality of payment with the certificates. This identical question between Hubbell and appellant trust company is decided in the appeal of F. M. Hubbell, intervener, this day decided and here referred to.

The order of the court appealed from is reversed and here reformed and rendered that after paying all "court costs" as specified in the order, and all taxes due by the receiver, State, county, municipal and school, next there shall be paid in full the obligations and demands

of the receiver incurred in and incident to the operation of the road while in his custody, as specified in the decree in class A and determined in this opinion, and prior to all other debts; and next after there shall be paid, and failing the sufficiency therefor the same to prorate, the receiver's certificates issued under order of the court of February, 1904. The judgment on demands of car rentals and loss of cars due the M., K. & T. Ry. Co. et al. is reversed and remanded for determination of the amounts due. The costs of appeal are taxed against appellant, the St. Louis Union Trust Company.

Reformed and rendered.

Writ of error refused.

No. 405. ST. LOUIS UNION TRUST COMPANY v. TEXAS SOUTHERN RAILWAY COMPANY ET AL. (KERN EQUIPMENT).

Receiver—Intervention—Lien—Judgment — Operating Expenses — Classification of Claims.

A railway having been placed in the hands of a receiver and ordered sold under foreclosure of the mortgage of bondholders, the decree classified the claims entitled to payment from the proceeds in order of priority as follows: A. operating expenses and costs; B. and C. claims for labor and for supplies furnished the company prior to the receivership and certificates for money borrowed to pay such claims. An intervener on a claim for engines and cars sold the company obtained judgment with foreclosure of his lien on the property sold. The operation by the receiver continuing, a subsequent order found the property necessary to the operation of the road and directed the payment out of the earnings, making it a claim under class A. as operating expenses, and it was partly paid out of the earnings. The property was then sold under the bondholder's foreclosure free from the intervener's lien. In a controversy over the right to priority of payment out of the proceeds between the intervener and holders of receiver's certificates (class B. and C.) it is held that the court should have directed the payment of the balance of intervener's claim out of the proceeds of the sale of the road, as a part of the expenses of operation having priority over the receiver's certificates.

C. E. Carter, for F. M. Hubbell, intervener.—The debt of appellant having been made a receivership obligation secured by special lien, was entitled to payment in full before the payment of the receivership certificates Nos. 1 to 151, held by the St. Louis Union Trust Company. International & G. N. R. Co. v. Coolidge, 26 Texas Civ. App., 595; Anderson v. Condict, 35 C. C. A., 335; 24 Am. & Eng. Ency. Law (2d ed.), 32, and authorities, note 2.

Appellant's claim being an operating expense of the receiver, and under the order of court secured in payment by a specific lien on the specific property, is entitled to priority in payment from the proceeds of the sale of the road with the specific property, before other unsecured creditors of the receivership. Vilas v. Page, 106 N. Y., 439; Miltenberger v. Logansport Ry. Co., 106 U. S., 386.

S. P. Jones, also for intervener.—The uncontroverted evidence shows that the indebtedness of $157,000, in favor of the St. Louis Union Trust Company, being the receiver's certificates, was not incurred in the operation of said property by the receiver, but was a

funding of an indebtedness that existed against the railroad at the time the receiver was appointed, and the court should have so found as a conclusion of fact, and should have found that all the other indebtedness set out in class "A" was incurred by the receiver in the operation of the property under the orders of the court. Wallace v. Loomis, 97 U. S., 162; Barton v. Barbour, 104 U. S., 134; Miltenberger v. Logansport Ry. Co., 106 U. S., 286; Union Trust Co. v. Illinois Midland Co., 117 U. S., 434; St. Louis Ry. Co. v. Cleveland Ry. Co., 125 U. S., 658; Burnham v. Bowen, 111 U. S., 776; Kneeland v. American Loan Co., 136 U. S., 89; Thomas v. Western Car Co., 149 U. S., 95; Waters-Pierce Oil Co. v. United States & Mex. Trust Co., 44 Texas Civ. App., 397; International & G. N. Ry. Co. v. Coolidge, 26 Texas Civ. App., 595; Gluck & Becker on Receivers, sec. 37, p. 91; Anderson v. Condict, 35 C. C. A., 335; Bank of Commerce v. Central Coal Co., 53 C. C. A., 334.

M. B. Templeton, for St. Louis Union Trust Co.—This debt having accrued long before the appointment of a receiver, is not entitled to participate in the fund to the prejudice of the obligations incurred by the court incident to the receivership. Vaughan Lumber Co. v. Martin, 98 Texas, 80.

LEVY, ASSOCIATE JUSTICE.—This appeal is one in a series of appeals by creditors in the above styled case, and is by F. M. Hubbell, owner of the "Kern Equipment" demand, as it is called in the record, found to be by the court a debt against the receivership arising from the necessary operation of the road by the receiver, and by the court classified as such, and its payment directed to be on equality with the certificates of the Union Trust Company. The opinion in the St. Louis Union Trust Company appeal, this day decided, is referred to for a fuller statement of the appeal.

The record shows that, prior to the receivership, F. P. Kern sold two engines and a combination passenger, mail and baggage car to the Texas Southern Railway Company, and to secure their payment retained a chattel mortgage upon the same. After the appointment of a receiver in this case Kern intervened in the receivership proceedings, at the first term after the appointment of such receiver, and obtained judgment to the amount of his debt, and with foreclosure of his chattel mortgage lien against such property. This decree of foreclosure recites that "said intervener's lien on the said property is superior to all other liens as far as said property is concerned, and that said property should be sold separately from the other property involved in this receivership. It is therefore decreed that the special master commissioner who shall sell the property involved in this receivership be ordered to sell said property separately and report proceeds into this court for payment to the intervener in said lien, and for the further disposition of this court. It is further ordered, adjudged and decreed by the court that S. P. Jones, receiver, be and is hereby ordered and directed by the court to keep each and all of the above-described property in good order and repair, fully restoring the same

or any part thereof should it be damaged or destroyed. The final decree of foreclosure, entered at the same term of the court, of the railway properties under mortgage to secure the bonds, specially ordered and decreed the sale of all such properties to be subject to the specific lien and rights in said decree adjudged in favor of said Kern upon said rolling stock. The sale of the railway properties under foreclosure failed for want of a bidder, and the court undertook to operate the road thereafter, as it appears in the record, and such rolling stock continued in the possession and use of the receiver in such operation of the road. It is admitted in the record that F. M. Hubbell is the owner of the F. P. Kern judgment debt against the railway company for such rolling stock. Thereafter, on the 24th day of March, 1907, F. M. Hubbell made application to the court to have the said judgment paid; and the court, after hearing said application, decreed, as far as material to set out, that, "it appearing to the court that said engines and car are now, and have been since the rendition of said decree, in the hands of the receiver of the property of the defendant, and are being used by him in the operation of the railroad in his hands, and that they are necessary to the operation of said road; and it further appearing that said judgment foreclosing said special lien, and that said Hubbell is entitled to an order of sale to sell the said property, and to have the proceeds applied to payment of said judgment, together with the accumulated interest thereon; it is therefore considered, ordered and decreed by the court that said judgment be and the same is classified as court costs and expenses of operation of the property in the hands of the receiver and placed in class 'A,' and the special master, P. M. Young, is ordered to pay the same, together with six percent interest from the date thereof until paid, in monthly installments of $400 per month; said payments to be made to said Hubbell, for which he shall receipt. Provided, however, that the payment of such installments shall commence and the first of same be paid on the first day of May, 1907. The court reserves jurisdiction of this order only for the purpose of finally classifying the same, as against the corpus of the property or the earnings at some future term, and it is expressly provided that the special lien in said decree against said engines and car is not affected by this decree." The sum of $1,200 in the aggregate was afterwards paid by virtue of this order, out of the earnings of the receivership. All of this rolling stock and the other railway properties were sold together at the foreclosure sale in August, 1908. After the said sale a decree of confirmation of the sale was entered by the court, which recites that the confirmatory conveyance ordered to be made and delivered to the purchasers "shall be a full and complete release of all liens, equities and title reserved in former judgments and orders of this court."

After stating the case.—After the sale of the railway properties the court directed the payment of the Hubbell demand in question out of the proceeds of the sale, and on an equality with the receiver's certificates. The appellant Hubbell specifies for error the refusal of

the receiver in priority to the certificates. The certificate holders also present error, and contend that the payment of this demand on an equality basis with the certificates was error.

It seems that the demand in question was first passed to judgment by intervention in the receivership as a pre-existing debt against the railway company, and with a foreclosure of the chattel mortgage lien on the particular engines and car to pay the same. The final decree of foreclosure in the receivership recognized this lien and directed a sale of the railway properties separate from the above property. The first sale of the railway failed for want of bidders, and the court undertook, it appears, to operate the road. It would thus far appear that the purchasers of the road took title subject to Hubbell's lien on the particular property in question, and that Hubbell would be referred to his proper legal remedy existing to him in this respect in regard to payment of his demand. But a proper construction of the further orders of the court shows, we think, that the court undertook and did assume to pay such indebtedness of Hubbell as a necessary operating expense of the receivership incurred in order to retain and have the use and ownership of the two engines and car for operating purposes. It appears that after failure to sell the road at foreclosure sale, and after more than a year of operation of the road by the court through a receiver, the appellant Hubbell made an application to the court for authority to have sold the engines and cars to pay his judgment of foreclosure thereon. On this application the court entered an order directing the payment of said judgment by the receiver out of his earnings of the road "as court costs and expenses of operation of the property in the hands of the receiver," instead of allowing a foreclosure sale to occur. In this order the court is specific in showing the necessity for the retention of the property, and further recognizing the right, in the circumstances of appellant, to have it sold to satisfy the debt. The court's findings were "that said engines and cars are now, and have been since the rendition of said decree, in the hands of the receiver of the property of the defendant, and are being used by him in the operation of the railroad in his hands, and they are necessary to the operation of said road; and it further appearing that said judgment forecloses said special lien, and that said Hubbell is entitled to an order of sale to sell the said property and to have the proceeds applied to the payment of said judgment and interest." It then decrees the payment of this judgment, allowing Hubbell to retain his lien. The court had the power, it must be conceded, to order the sale of the property and the proceeds paid to Hubbell, and he had the power to authorize the receiver to become the purchaser at sale. What the court could do directly was in this instance done indirectly—that is, by an order treating the debt as a receivership obligation, turning the equipment into a receivership asset and recognizing the former lien for the payment, in installments, of the balance. It appears that $1,200 out of the earnings was paid by the receiver on the judgment. The court expressly retained jurisdiction over the order "for the purpose of finally classifying the same as against the corpus of the property or the earnings at some future term." It appears that this particular property was actually passed to

the receivership assets and sold with all the property in bulk, and confirmed to the purchasers in "full and complete release of all liens, equities and title reserved in former judgments and orders of this court." This latter recital and decree obviously has application to the Hubbell judgment of foreclosure on the rolling stock. The court makes the finding that all the demands in class "A," in which the residue of the instant demand was placed for payment, "were contracted and created during the receivership, and are just charges against the same for the respective amounts therein set forth, and that all of said debts grew out of and were incident to the operation of the road in the hands of the said receiver." It follows, we think, that the finding of the court is sustained that the residue of the demand in question, in the facts, legally became and was a receivership obligation growing out of and incident to the operation of the road by the receiver.

It appears that the order of the court first made to pay the Hubbell judgment classified it "as court costs and operating expenses of the property in the hands of the receiver and placed in class 'A,'" payable, however, at the time out of the earnings of the road. But the order further expressly reserved the jurisdiction and power of the court, it recites, to finally order its payment, at a later term of the court, "as against the corpus of the property or the earnings." When it came time for the court to exercise his power to order the final payment of this particular demand, the court expressly exercised his power to direct the payment out of the proceeds of sale along with the other operating expenses and charges of the receiver. This final order placing this demand in same class with other operating expenses conclusively evidences the purpose of the court to have same paid as previously ordered, "as operating expenses." Holding, as we do, that the court's finding is sustained, and the residue of the Hubbell demand was properly classed by the court as an obligation of the receivership as such, and holding, as we have in the appeal of the certificate holders, that the certificates in question by the terms of the order of their issuance were expressly made payable subject to operating expenses and charges incurred by the court through the receiver in the operation of the road while in his custody, the contention of appellant Hubbell is sustained and the assignments of the St. Louis Union Trust Company are overruled.

The decree of the court as between appellant Hubbell and the certificate holders is so far reversed and here reformed that the demand of F. M. Hubbell be paid out of the proceeds of the sale as operating expenses and charges of the receiver in priority of payment of the certificates in question, and that the decree of the court, as between these said parties, as here reformed, be then affirmed, with costs of this appeal against the St. Louis Union Trust Company.

Reversed, reformed and rendered.

Writ of error refused

No. 405. ST. LOUIS UNION TRUST COMPANY v. TEXAS SOUTHERN RAILWAY COMPANY ET AL. (RAILWAY CLAIMS).

1.—Receiver—Operating Expenses.

Claims of other railways against a receiver operating a railroad for rentals of and damages to their cars in his hands were properly allowed as operating expenses and given such priority of payment out of the receipts or proceeds of sale of the corpus of the property as by the judgment of foreclosure had been assigned to claims of that class.

2.—Same—Findings of Master.

Claims against a receiver were filed by interveners in the suit and referred to a master in chancery for adjudication and by him reported back, with the amounts, as creditors of the receiver. In the absence of other findings on the subject, this was to be taken as an adjudication by the master of the validity of such claims.

3.—Same—Contesting Master's Findings.

Claims of interveners against the receiver having been referred to a master in chancery and he having included them in his report to the court of obligations of the receiver, other parties, if entitled to contest the allowance of such claims, could do so only on exception to the master's findings and notice and opportunity given claimants to be heard. A mere objection to the priority of payment given them did not raise the question of their validity as to amount. And an order of the court reducing the amount allowed, without contest made or notice to claimants, was erroneous.

Coke, Miller & Coke and *Schluter & Singleton,* for Missouri, K. & T. Ry. Co. and Missouri, K. & T. Ry. Co. of Texas.—The amount claimed by the intervener was found to be correct, just and due by the master to whom all such matters were referred, and by the sworn report of the receiver, who also admitted that the account and claim was just and due, and there was no evidence whatever showing or tending to show that said account was not just, due and unpaid. There was no contest of this claim, and the intervener had no notice of any contest of its said claim and account, and therefore the said action of the court thereon was contrary to the law. Dunlap v. Southerlin, 63 Texas, 38; Gulf, C. & S. F. Ry. Co. v. Vieno, 7 Texas Civ. App., 346; Riverside Lumber Co. v. Lee, 7 Texas Civ. App., 522; First Nat'l Bank of Nacogdoches v. Hicks, 24 Texas Civ. App., 269; Orchard v. National Exc. Bank, 98 S. W., 824.

The debts actually incurred by the receiver or receivership obligation are entitled to priority in payment from the proceeds arising from the sale of the corpus of the property as against all claims not termed receivership obligations. Indebtedness actually and necessarily incurred in the preservation and operation of the property is entitled to priority of payment. Alderson on Receivers, 441; International & G. N. R. Co. v. Coolidge, 26 Texas Civ. App., 595; Ellis v. Water Company, 86 Texas, 109; Miltenberg v. Logansport Ry. Co., 106 U. S., 286; Bank of Commerce v. Central Coal Co., 53 C. C. A., 334; Union Trust Co. v. Illinois Cent. Ry. Co., 117 U. S., 434.

S. P. Jones and *J. H. T. Bibb,* for Wabash, Colorado & So., Penn-

sylvania, Chicago & G. W., St. Louis & S. F., Atlantic C. L., Texas Mid., Norfolk & W., Erie, New York C. & H. R., Chicago & N. W., Baltimore & O., Cincinnati, N. O. & T. P., Southern, Chicago, M. & St. P., Illinois Cent., Mobile & O., Lake S. & M. S., Penn. Co., Pittsburg, C., C. & St. L. Railway Companies, and for Hussey & Whelan, Ogburn-D. Lumber Co., Lima L. & Mach. Co., Gilmer Ice & L. Co., Dorsey Print Co., Elliott Frog & S. Co., Baldwin Loco. Wks., Harrison County Lumber Co., Handlan-Buck Mfg. Co., Linley Supply Co., Edwards & Co., and Waters-Pierce Oil Co.—The court erred in rendering any judgment affecting the rights of these appellees, because they were not parties to the suit and had no notice whatever of the same until long after the rendition of the judgment herein, and to render a judgment affecting their rights without notice to them was to deprive them of their property without due process of law. 1 Black on Judgments, sec. 220; 23 Cyc., 684; Stuart v. Palmer, 74 N. Y., 183; Cooley's Constitutional Limitation, 6th ed., pp. 431-496; Bates v. Casey & Swasey, 61 Texas, 592; Anderson v. Condict, 35 C. C. A., 335; Leadville Coal Co. v. McCreery, 141 U. S., 475; Williams, Adm'r, v. Gibbs, 17 How., 249; Kunutz v. Sumpton, 117 Ill., 1; Gilmore v. Sapp, 100 Ill., 297; Jack v. Thompson, 41 Miss., 49; Myer on Vested Rights, secs. 768, 769.

The indebtedness actually incurred by the receiver or receivership obligations is entitled to priority in payment from the proceeds arising from the sale of the corpus of the property as against all claims not termed receivership obligations, and as between those claims arising and incurred in the administration of the property by the receiver, the indebtedness actually and necessarily incurred in the preservation and operation of the property is entitled to priority of payment. Alderson on Receivers, page 441; Anderson v. Condict, 35 U. S., 335; International & G. N. R. Co. v. Coolidge, 26 Texas Civ. App., 595; Ellis v. Water Co., 86 Texas, 109; Kneeland v. Bass Foundry & Mach. Wks., 140 U. S., 592; Miltenberger v. Logansport Ry. Co., 106 U. S., 286; Bank of Commerce v. Central Coal & Coke Co., 53 C. C. A., 334; Kneeland v. American L. Co., 136 U. S., 89; Mercantile Trust Co. v. Farmers L. Co., 26 C. C. A., 383; Hullings v. Jones, 6 S. E., 874; Perrin Printing Co. v. Cook Hotel Co., 93 S. W., 337; People's Nat'l Bank v. Virginia Textile Co., 51 S. E., 155; Union Trust Co. v. Illinois Mid. Ry. Co., 117 U. S., 434.

LEVY, ASSOCIATE JUSTICE.—In the appeal of the St. Louis Union Trust Company, this day decided and the opinion here referred to, in its eleventh assignment, complaint was made of the allowance by the court as operating expenses incurred by the receiver of claims and demands of car rentals and loss and damage to cars by fire and operation. These demands are held by the M., K. & T. Railway Company of Texas, and many other railway companies herein, and these companies file assignments claiming priority of payment out of the proceeds of sale of the railway properties as necessary operating expenses of the receiver, and challenging the action of the court in reducing the amount of their several demands upon the ground that they had no notice of any contest or denial of the correctness of their demands by

the St. Louis Union Trust Company, the certificate holders. It was determined in the appeal of the trust company, the certificate holders, that indebtedness incurred by the receiver in, or arising out of, or incident to, his necessary operation of the railway by order of the court, such as car rentals and loss and damage to such cars by fire and operation while in the control of the receiver, were demands properly classified and allowed by the court as operating expenses of the receiver, and were properly payable as such, as ordered by the court, out of the proceeds of the sale of the railway. The finding of the court was that such demands were incurred by the receiver and necessarily arose out of and were incident to his operation of the road, and were necessary as actual operating expenses and charges of the receiver, and were just charges against the receiver as such. It was further ruled in the St. Louis Union Trust Company appeal that these demands, as operating expenses of the receiver, were entitled to priority in payment to the certificates in question because the terms of the order authorizing the issuance of the certificates expressly decreed their payment, as in classes "B" and "C," below operating expenses and charges of the receiver in class "A."

The specification of error of the several railway companies as to the reduction of the amount of their several demands, upon the ground specified, is next considered, and should be, we think, sustained. These several appellees, made such in this court by this appeal, in obedience to an order of the court, it appears, filed their respective demands with the master, to whom the same were referred, and who was authorized by the court, if found to be just and correct, to approve them, and if not so found to disapprove them, and to make due report to the court of his action in the matter so referred to him. The report of the master to the court, as shown in the record, contains a list of creditors of the receiver, appellees being among the number, with the amounts due each and for what the amounts are due and owing that had been filed with him. No particular findings of the master appear. The receiver, under order of the court, filed his report of outstanding and unpaid indebtedness due by him in his operation of the road, and the demands of appellees with the amount due appear on the report. The report of the receiver is verified by his affidavit thereto. The amounts due as reported by the master and the receiver are the same, and this is the amount the several appellees claim respectively is due them. The amount so reported and claimed was reduced by the court at the instance, it appears, of the St. Louis Union Trust Company. No objection or exception was made to the report of the master or receiver specifically with respect to appellees' demands by the St. Louis Trust Company or by any other creditor or party to the proceedings. There does appear a general exception by the said trust company as to any demand or debt being allowed payment out of the proceeds of the sale on an equality with or in priority of their certificates. But the justness or correctness of the amounts of the appellees' demands is not challenged by the pleading of the said trust company. In this attitude of the case the court, on the hearing of the intervention of the said trust company and on the evidence offered by the trust company as to the amount that appellees

should have allowed in their favor, reduced the amount of the several appellees' demands. This was error, we think, in the record in this case. In view of the order of the court referring these claims to the master for ascertainment of amounts and justness thereof, the report of the master to the court must be considered by this court as involving a finding by him and report thereof to the court in favor of the amounts due, as correct and just, that he so reported. The master having the power to make findings in these claims, then, in order for the other creditors to call in question his conclusions, objections should have been filed to his report. Fletcher on Eq. Pl. and Pr., sec. 601; Hamm v. Live Stock Co., 18 Texas Civ. App., 241, 45 S. W., 330. No such objections having been filed either before the master or before the court, the appellees had a right to rely upon the finding of the master as to the amount so reported, and to presume, in the absence of any exception thereto, that the amount of their demands so reported would be allowed and decreed by the court as determined by the master. There does not appear any error on the face of the master's report that would authorize or require its being inquired into further. It affirmatively appears that the reduction of the amount of appellees' demands as reported by the master was not made on the court's own motion, but solely at the instance of the trust company. If, independent of the master's report, the said trust company, as adverse claimants of the fund, had sufficient grounds to contest the correctness of the amounts properly due these appellees at the time of the distribution of the funds, and desired so to do under proper order of the court, it still should be done under proper specific exceptions and with notice thereof to appellees. But here no exception or objection was made to the appellees' demands, except in the form of a legal contention as to the proper classification they should take. This was not sufficient to advise appellees that a contest of the correctness and justness of their demands was being made by creditors, and that it should be met with proof at their hands. If it was proper to allow a contest to be made by the trust company of the amounts due appellees, it would still be proper to allow the appellees an opportunity to appear and offer proof of their correctness before same are finally disallowed in part. It may be that the trust company has reasonable grounds in the record to contest the reasonableness of the amounts due appellees, and we have hesitation to render judgment, and conclude that it would be in the interest of fairness and justice to the appellees and to the trust company that the case be remanded for determination under proper pleadings of the amounts due appellees.

The judgment of the court, in so far as it classifies and directs payment of the appellees' claims for car rentals and for loss of cars by fire and operation, as operating expenses of the receiver, is sustained, and in so far as it directs payment on an equality basis with the receiver's certificates in question is reformed as to direct payment in priority of the said certificates, and, as reformed in this respect, is affirmed; but in so far as it determines the amounts of the appellees' demands, is reversed and remanded, with instructions to hear, under proper pleadings, evidence, if desired by the parties, on the part of

appellees and the trust company, and then fix the amounts as might properly, in the opinion of the trial court, be found to be due.

Reformed and remanded.

No. 362. F. M. HUBBELL, INTERVENER, v. TEXAS SOUTHERN RAILWAY COMPANY ET AL.

Railway—Receiver—Liens of Vendors, Laborers, Material Men, etc.—Foreclosure—Priority of Payment.

A railway having been sold under foreclosure of the bondholders' mortgage, question arose as to priority of payment (between holders (1) of a claim for price of land sold the company for right of way secured by vendor's lien; (2) of receivers' certificates for money borrowed to pay off wages due laborers by the company and secured by laborers' lien; (3) of like certificates to pay off liens for supplies and materials furnished the company) out of so much of the price realized on the foreclosure sale as was proportionate to the part of the road to which the vendor's lien attached (25¼ percent). Held, that by the order authorizing the issuance of the certificates, this took priority such as was given to the debts discharged by their proceeds; that the laborers' liens were superior to the vendor's liens and were to be first paid; that the vendor's lien was next and took precedence of so much of the certificates as went to pay material men's claims; that as to a surplus derived from the sale of the certificates which the receiver used for operating expenses it was to be assigned to the rank of the laborers' or material men's liens respectively, in proportion to the amount of each which was actually paid off; that the attorneys' fee provided by contract for the holder of the vendor's lien took the same lien as his debt.

T. P. Young and *T. S. Schluter,* for intervener Hubbell.—Where the receiver's certificates are issued during the administration of the assets of an insolvent railroad by a court of equity, in a receivership, for the purpose of paying claims which existed against the railroad before the appointment of a receiver, and which claims were secured by the statutory liens in favor of laborers, mechanics and others, such certificates are not secured by any higher or better lien that such claims were secured by, and they stand in the place of such liens so far as classification and priority of payment out of the proceeds of the property is concerned; especially is such the rule where the judgment authorizing such certificates so provides. International & G. N. R. Co. v. Coolidge, 26 Texas Civ. App., 595; Galveston Exhib. Ass'n v. Perkins, 80 Texas, 62; Faber v. Muir, 64 S. W., 938; 24 Am. & Eng. Ency. Law, 2d ed., pp. 39, 40; Farmers L. & T. Co. v. Centralia R. C. Co., 96 Fed., 636; Metropolitan Trust Co. v. Railway Co., 103 N. Y., 245; State v. Edgefield, 6 Lea (Tenn.), 353; Tome v. King, 64 Md., 183; 2 Beach on Private Corporations, sec. 746; Florida v. Anderson, 91 U. S., 667; Carpenter v. Blackhawk, 65 N. Y., 43.

The court could not legally issue a receiver's certificate to pay a debt the railroad owed before the receiver was appointed for rolling stock delivered to it before the receiver was appointed, and make such certificates a superior lien to the vendor's lien existing on the right of way long before the debt was incurred. International & G. N. R.

Co. v. Coolidge, 26 Texas Civ. App., 595; 24 Am. & Eng. Ency. Law, 2d ed., pp. 39, 40; Farmers' L. & T. Co. v. Centralia R. Co., 96 Fed., 636; Metropolitan T. Co. v. Railway Co., 103 N. Y., 245; State v. Edgefield, 6 Lea (Tenn.), 353; Tome v. King, 64 Md., 183.

Where the vendor's lien applied to and existed on the land on which a part of the railroad lay, and the whole road is sold in receivership proceedings to pay debts, and sold free of the vendor's lien, and in satisfaction of it, that proportion of the proceeds of said sale which is equal to the proportion of the length of the road on which the lien existed to whole length of the road should be applied to the payment of the vendor's lien, in preference to all other debts except clerk's cost and master's fees. Union Trust Co. v. Illinois Midland Co., 117 U. S., 436; Rome R. Co. v. Sibert, 97 Ala., 393; Green v. Coast Co. L. R. R. Co., 54 Am. St. Rep., note p. 402; Hand v. Savannah R. Co., 12 S. C., 314; Crosby v. Morristown & C. G. R. Co., 42 S. W., 522; Compton v. Jessup, 68 Fed., 327; Galveston Exhib. Ass'n v. Perkins, 80 Texas, 62; Faber v. Muir, 64 S. W., 938-9.

M. B. Templeton, for St. Louis Trust Co.—The so-called "vendor's lien" debt asserted by F. M. Hubbell, being a pre-existing obligation the Texas Southern Railway Company contracted long before the receivership, and only secured by a lien, is not an obligation entitled to priority over the obligations made by the court incident to the receivership, neither is it entitled to pro rata payment with the receiver's obligations. Royal Trust Co. v. Railway, 120 Fed., 13.

F. M. Hubbell being the owner and holder of the vendor's lien debt at the time of the decree ordering the issuance of receiver's certificates, and being a party to the proceeding, and having actual knowledge thereof and consenting thereto, and not appealing therefrom, is estopped from denying the priority of lien in favor of receiver's certificates, and hence the St. Louis Union Trust Company, the holder of the said certificates, should be first paid out of the fund in court before any payment is made upon the vendor's lien debt. Union Trust Co. v. Midland R. Co., 25 Am. & Eng. R. Cases, 577; Humphreys v. Allen, 4 Am. & Eng. R. Cases, 20.

LEVY, ASSOCIATE JUSTICE.—This appeal is one in a series of appeals by creditors from the order of the court in distribution of proceeds of sale of the properties of the Texas Southern Railway Company under decree of foreclosure in receivership proceedings, and is by F. M. Hubbell, owner of the demand called in the record "the vendor's lien against the right of way of the Texas Southern Railway Company." The opinion this day rendered in the appeal of the St. Louis Union Trust Company, holders of the receiver's certificates, is here referred to for a statement of the receivership proceedings and the issuance of the certificates.

The record shows that the demand in question arose as follows: On the 24th day of January, 1901, the Commercial Lumber Company, a private corporation doing a sawmill business, sold and conveyed by warranty deed to the Texas Southern Railway Company a strip of land 100 feet wide and 18¾ miles in length, extending from

a point near Gilmer, in Upshur County, Texas, to Montvale Springs, in Harrison County, Texas, and from Montvale Springs to Harleton, in Harrison County, Texas. The conveyance also included the improvements on the strip of land, which consisted of a railroad with iron rails and cross-ties which formed the superstructure of a sawmill private tram. The property was not connected in any way with the public use, and was not used in the business of a common carrier. The consideration of the conveyance was $45,000, $8,500 cash and the remainder in twelve notes. In the deed conveying the land from the Commercial Lumber Company to the said railway company a lien to secure the unpaid purchase-money was reserved in express terms and expressly recited in the notes. On the 24th of February, 1901, the Texas Southern Railway Company, under authority of its board of directors, executed a deed of trust to one J. E. Tucker on the said particular property conveyed to secure the said purchase-money notes and the said deed of trust, reciting that it was given to secure the purchase-money notes and the vendor's lien and to preserve and perpetuate and further secure the vendor's lien. Both the deed and deed of trust were only recorded in Upshur and Harrison Counties. The deed of trust and the deed mentioned were submitted to the Railway Commission of Texas, and the Railway Commission approved the purchase. Four of the said vendor's lien notes were paid off by the railway company, leaving the eight here in suit unpaid. The Commercial Lumber Company afterwards transferred without recourse the notes to the St. Louis Union Trust Company, and the St. Louis Union Trust Company, on the 13th of October, 1904, transferred them to F. M. Hubbell, the appellant. After the proceedings for a receiver, and during the pendency of receivership proceedings, and on the 25th of January, 1908, before the sale of the railway, F. M. Hubbell filed a suit in the District Court of Harrison County, Texas, against the Texas Southern Railway Company and C. L. Taylor, the receiver, and the Commercial Lumber Company, and J. E. Tucker, trustee, and the Orient Trust Company, plaintiff in receivership proceedings, to recover the amounts due on these notes and attorney's fees, and to foreclose a vendor's lien on the property described in the conveyance from the Commercial Lumber Company to the Texas Southern Railway Company. The suit was discontinued as to J. E. Tucker, trustee, and a judgment was rendered by the District Court against the Texas Southern Railway Company for the amount of the notes, interest and attorney fees, with foreclosure of the vendor's lien on the property described in the petition and deed mentioned. In this judgment it was provided that the road be sold as under the foreclosure decree in the receivership case as an entirety, and that Hubbell be paid out of the proceeds of such sale "according to preferences and priorities of said liens." On June 4, 1908, appellant filed his intervention in the receivership proceedings, and asked that his judgment be classified and paid out of the proceeds of the Texas Southern Railway Company property, and this intervention was amended at the following August term, 1908, before the sale, in which he claimed that the said judgment should be paid out of the proceeds of the sale, and in preference to all costs and receiver's certifi-

cates, except the judicial costs. After the sale of the railway properties, and on hearing of this amended intervention of appellant, at the October term, 1908, the court directed the payment of his demand on a basis of equality of payment with the receiver's operating expenses and the receiver's certificates in question. The appeal is from the ruling of the court.

After stating the case.—The specification of error, by assignments of appellant and the St. Louis Union Trust Company, challenges the ruling of the court that the demand of appellant Hubbell should be on a basis of equality of payment out of the proceeds of sale with the certificates of the receiver. Each party contends for priority of payment.

The final decree of the court, of September 22, 1904, foreclosing the mortgage of the bondholders and ordering the sale of the railway properties, it appears, adjudged that the railroad should be sold "subject to specific liens, if any, of persons not parties to this action," and "to all holders of vendor's lien demands, whether herein or hereafter adjudicated." Appellant Hubbell thereafter, it appears, prosecuted to judgment and foreclosure his vendor's lien notes in a distinct action against the railway company, the Commercial Lumber Company, plaintiff in the receivership action, and the receiver. In his judgment of foreclosure it is recited that, "and it further appearing to the court it is to the interest of the defendant and all other parties creditors of the said defendant, Texas Southern Railway Company, that the railroad and entire property of the said defendant should be sold in bulk, or as a whole, and that the sale of that part of the said railroad and property of the said defendant, upon which this plaintiff has and holds a lien as above set forth, would result in loss both to the defendant and all other creditors of the defendant, the Texas Southern Railway Company, and the court having directed a sale of said entire railroad and property of the Texas Southern Railway Company to be made on the first Tuesday in May, 1908, it is therefore further ordered that this judgment be paid out of the proceeds of such sale according to preferences and priorities of said liens." The court, it appears, confirmed the sale of all the properties to the purchasers free of all liens and claims of every kind. From the foregoing statement of the record it is made to appear that only a decree of strict foreclosure of his lien was decreed by the court to appellant Hubbell. By the terms of the decree, in lieu of an order of sale under the same, appellant was referred to the proceeds of sale "according to preferences and priorities of said liens." This was a final decree, and was neither appealed from nor vacated. By this intervention to have his rights determined as to participation in the funds of sale appellant, we think, became and was a full and formal party to the proceedings for the express purpose of giving him such relief as he should show himself entitled to "according to preferences and priorities of said liens." Appellant himself makes no contention that he is not a proper and full party to the order of the court, and bound thereby unless vacated on appeal.

The record shows that the railway company was insolvent, and that it was in fact administered by the court for the benefit of all its

creditors, and that the assets of the railway company were sold to pay all its indebtedness and the proceeds of sale were being distributed by the court according to the rights and equities of the creditors. Appellant by his intervention sought to have his judgment paid out of 25¼ percent of the total fund arising from the sale, which he alleged was the value of the particular property he had a lien against, and that this percent was the amount that this particular property brought under the sale. The court, at the instance of appellant, made findings, and he states: "It was admitted that the part of the railroad sold by the Commercial Lumber Company to the Texas Southern Railway Company, and on which the vendor's lien was retained, was 18¾ miles in length, and that it was part of the Texas Southern Railroad, and the Texas Southern Railway was 74 22-100 miles in length, so that the 18¾ miles on which the vendor's lien existed was equal to 25¼ percent of the entire railroad, including that part on which the vendor's lien existed, had been sold as hereinbefore recited, all together, and the purchase money paid into the court in the cause." This is not challenged by the parties. No sale, however, was ordered by appellant's judgment. Appellant's status, as made by the record, is that of a lienholder against the particular property of the railway company claiming payment out of the fund which this particular property brought at sale. By admission of the record such particular property brought at sale of the entire property, and was worth, 25¼ percent of the total price of $286,000. The only contestants of appellant's demand are the holders of the receiver's certificates. It appears conclusively that the purchase price of the entire road, after deducting the 25¼ percent in controversy, is more than sufficient to pay the costs and allowances by the court, as well as all the operating indebtedness incurred by the receiver as such, and appellant can have no concern as to such. This would dispose of any question in respect thereto. The question in the record is, therefore, as to whether appellant's demand is payable out of this particular part of the fund in priority of the certificates. After paying the operating expenses of the receiver, and costs, the fund remaining, inclusive of the 25¼ percent in controversy, is not sufficient to pay in full the certificates and the demand of appellant. We have ruled in the appeal of the certificate holders, this day decided, that the certificates in question were, by the terms of the order of the court authorizing their issuance, payable "as the laborers' liens and materialmen's liens under the Texas statutes," which these certificates were used as a form of payment of. See St. Louis Union Trust Co. v. Texas Southern Ry. Co. et al. It is recognized that a lien exists in case of a grant of a right of way to a railway company when the consideration in the grant is not paid. Howe v. Harding, 76 Texas, 17, 13 S. W., 41. A vendor's lien may be assigned. McAlpine v. Burnett, 19 Texas, 497. The statutes provide the lien on the railroad for both laborers and materialmen. So we are able to say by the record that appellant Hubbell's right to payment out of the fund arises from a vendor's lien on the property, and that the certificate holders' rights arise by a lien created by the court of the legal force and extent of laborers' liens and materialmen's liens under the statutes. The exact nature

of the laborers' and materialmen's liens is not defined in the order of issuance of the certificates. The finding of the court shows that it was admitted in the trial that the order of classification of such liens was "class 'B' claims, being those of labor operatives incurred within one year prior to appointment of receiver," and "class 'C' claims, being statutory liens of materialmen and contractors." The labor liens referred to in the certificates must be taken, in the proof, to mean and to be the class of operatives of the railroad doing manual service, and materialmen's liens to mean the class of persons furnishing material for construction or repair of the buildings or railroad. Referring, therefore, the face of the order authorizing the issuance of the certificates to these provisions of the statutes, it is evident that the court intended to give a lien to the certificates to the extent that both "operatives" of a railroad and "materialmen" have under the terms of the statute on the railway properties. From the record we are unable to say whether the material furnished was for buildings or equipment or roadbed of the railway company. The order of the court authorizing the issuance of the certificates fixed such lien on all the property of the railway of every kind and character. Appellant, not being a party to the action at the time of the issuance of the certificates, is entitled to contest the priority of payment of the certificates as against his lien. International & G. N. Ry. Co. v. Coolidge, 26 Texas Civ. App., 595, 62 S. W., 1097. In the instant case, as in this last case, it is not made to appear that the issuance of the certificates to pay off these debts of the railway company was necessary for the operation of the road by the court. The first question, therefore, is whether such statutory liens are payable in priority of the vendor's lien. Ordinarily vendors' liens have priority over mechanics' liens. 2 Warveille on Vendors, sec. 710. And a contract to purchase land does not constitute the vendee the "owner" within the terms of the statute. Galveston Exhib. Ass'n v. Perkins, 80 Texas, 62, 15 S. W., 633; Taber v. Muir, 64 S. W., 938. The construction given section 3301, Revised Statutes, is that mechanics' liens do not have preference over any prior lien or encumbrance upon the land to the inception of the mechanic's lien. Sullivan v. Texas Briquette Coal Co., 94 Texas, 541, 63 S. W., 307. Appellant's lien was shown to be prior to any mechanic's lien. It follows that such lien can not be ruled to be superior to appellant's. The lien for operatives who performed labor for the company, however, by the terms of the statute, is "a lien prior to all others upon such railroad and its equipment for the amount due for his personal services." There does not appear that any equipment or rolling-stock is here in controversy by appellant, only the railroad. The Legislature has authority to provide that the claims of employes of railroads shall be liens prior in right to any mortgage or conveyance made subsequent to the enactment of the statute. 3 Cook on Corporations, p. 2985. Laborers who perform manual services under this article have a lien. St. Louis, A. & T. Ry. Co. v. Mathews, 75 Texas, 92, 12 S. W., 976. In the light of the statutes and decisions, we are confronted with the difficulty of determining from the face of the order authorizing the issuance of certificates the extent of the lien that the certificates would have on the particular part of the

fund here in discussion as against appellant's lien. The order provides that the certificates shall be paid "with preference and priority, the same as class 'B' and class 'C' would be." The amount of the certificates to be paid as class "B" and class "C" respectively is not fixed. As the certificates have the force and extent of two characters of liens, we would not be warranted in giving the entire amount the full extent of the lien that "operatives" of a railroad have, or lessening the entire amount to the extent that a materialman would have. The certificate contract does not do so. In this indefinite situation, we refer to the order for further light, and it recites that the receiver is authorized to borrow a sum "not to exceed $150,000, as may be necessary to pay said claims in class 'B' and class 'C.'" In order, therefore, to give the certificates the extent of the lien so provided in the order, as against appellant, we would be required to go to the facts of the case and see the amounts paid for material liens and labor liens respectively. The records show that about $28,330 was the amount of the materialmen's liens paid off in class "C," and about $89,170 of labor liens in class "B" paid off from money derived from the certificates. Giving the certificates the extent of the liens so provided in the order and contemplated under the terms of the order, the certificate holders would be entitled to have payment of their certificates to the full amount represented by the amount of labor liens paid off in priority of appellant. As mechanic liens, in the record, would be subordinate to appellant's lien in the particular fund, he would be entitled to be paid next before the amount of certificates representing the amount of mechanics' liens paid off. As the amount of the certificates was $150,000, this leaves in the record about $32,500 above the amounts actually necessary, in the record, to pay off the lien indebtedness mentioned. Referring to the order authorizing the certificates again, it appears therefrom that the receiver was "empowered and authorized to borrow money in a sum not to exceed the sum of $150,000 as may be necessary to pay said claims in class 'B' and class 'C' and for which said sum of money to issue receiver's certificates." There is no question made by assignment that the receiver exceeded his authority in issuing certificates above the amounts necessary to pay these said debts, and we do not here undertake to decide such question or challenge the validity of the surplus amounts. We assume that they were all properly issued. As the certificate holders rely on the order for their entire claim, we must decide their rights as under a contract. Referring to the evidence in the record, it appears that this $32,500 was used by the receiver in paying current expenses of the operation of the road. If the certificates were all properly issued by the receiver, as we assume in the record, it is true that the certificate holders would not legally be remitted to see that the receiver properly applied the proceeds. But it is quite proper to refer to what was done with the money in order to fix the extent of and properly bring the same under the proper certificate lien for this amount, as against appellant, such lien being dual. The certificate holders do not seek to have their rights determined for any such surplus above the actual lien indebtedness of the company, for the payment of which the certificates were authorized, outside and inde-

pendent of the order authorizing their issuance. But they rest upon such order. So doing, the surplus in question must be payable as the order provided, either as a lien as operatives would have, or as a mechanic's lien would have. As the order authorized a sum not to exceed the amount of the certificates "as may be necessary to pay" such indebtedness of the company as liens for operatives and mechanics, and assuming the validity of the entire issue, it must have been contemplated, under such wording of the order by the receiver and the certificate holders, that a surplus above the actual indebtedness mentioned would probably exist after paying such indebtedness. In order to sustain the certificates for the full amount, and to give proper effect and force to the order of their issuance, it must be ruled that, if a surplus existed above the amount "as may be necessary to pay said creditors in class 'B' and class 'C,'" that it was contemplated by the certificate holders, under the terms of the order of the court, that such surplus would be paid out of the proceeds ratably as the ratio of the debts of the labor liens bore to the mechanics' liens. In such ratio should this surplus amount mentioned, we think, be distributed and paid, as against appellant, and we so rule.

It is the contention of appellant that labor liens have no priority over a vendor's lien. The terms of the statute, we think, settle the contention. A mortgage lien to secure bonds of a railway is subordinate to such liens, it is conceded. A vendor's lien held by an assignee is no more sacred than any other contract lien. A voluntary conveyance of right of way to a railroad company is consent of the owner that the land go into possession of the railway for such public uses and purposes. Such voluntary act and consent places the property thereafter under statutory control and regulation as a part of a railroad operated as a common carrier under the laws of the State, as against labor liens. It is quite different from the rule applicable to forced or condemnation proceedings as against the owner of the land. It is argued that as against labor liens of the statute the lienholders' right to subject the land to his payment should be prior, because the property by voluntary sale comes into the possession of the company charged with the lien, and the company takes it in the condition it was when it came into its possession. The suit is not for recovery of the title to the land, and the statutory liens in question have been determined valid to the extent of the terms of the statute, which are "a lien prior to all others." It is upon the reason that it is necessary to operate railroads as a public concern, and the public have a right and concern in their being properly operated. It is a policy of the land that in such operation the operatives of the railroad have a prior lien to secure their unpaid wages. Sellers of right of way, as well as all other voluntary lienholders, must take notice of the provisions of the law that their liens are subordinated by the terms of the statute to liens of operatives of a railroad for unpaid wages. When the assets of an insolvent railroad company fail in sufficiency to pay both the lienholders for property sold and the unpaid wages of laborers, it is not a harsh rule in policy and principle that the law has chosen that the loss, if any, should fall on the voluntary lienholders for property sold rather than on the laborers.

The $7,000 issue of certificates of date September, 1905, was issued to purchase necessary rolling stock for the operation of the road by the receiver, and the order recites that it was necessary for the operation of the road by the receiver that it be purchased. The court classed its payment as operating expenses, and ordered its payment as such, and we have ruled in the appeal of the St. Louis Union Trust Company that this was proper and not error. It was further payable out of the amount of the proceeds of sale that appellant does not seek to have his claim paid out of.

Appellant complains of the refusal of the court to allow his judgment for attorney's fees to be paid at all out of the proceeds of sale. This was error, and the same in this respect is here allowed. Appellant stood on his contract and the certificate holders stood on their contract, and equities were not being adjusted, but contract rights determined by the court. Appellant's contract provided a lien for attorneys' fees. Summerville v. King, 98 Texas, 338, 83 S. W., 682.

The judgment of the court was ordered reversed, and here reformed, that out of the 25¼ percent of the proceeds of sale here in controversy such amount of the certificates, and interest thereon, of the $150,000 held by the St. Louis Union Trust Company, appellee, as here assigned to the lien of the rank of labor liens for operatives of the railroad, be paid in full in priority to appellant Hubbell's claim, and that then next be paid in full the claim of appellant Hubbell, and then next be paid the amount of the certificates and interest of appellee as here assigned to the lien of the rank of materialmen. The costs of appeal to be paid equally by appellant and appellee.

Reformed and rendered.

Writ of error refused.

No. 363. ORIENT TRUST COMPANY ET AL. v. ST. LOUIS UNION TRUST COMPANY.

1.—Receiver—Mortgage Foreclosure—Compensation of Trustee.

A deed of trust securing railway bonds provided for payment by the mortgagee of reasonable compensation for the trustee's services and expenses and fees to his attorneys in case of suit for foreclosure. An order of the court fixing an allowance for such compensation and fees is held to be made in the enforcement of such contract right, and not on any equitable ground which would give the sum allowed precedence of payment as costs of suit.

2.—Same—Priority of Claims.

A judgment of foreclosure of a deed of trust securing railway bonds classed the claims to be satisfied thereby as follows: A, operating expenses; B, labor liens; C, liens for materials furnished; D, bonded indebtedness; E, unsecured claims. Held, that an allowance of compensation to the trustee and his attorneys, made by the court in pursuance of the right thereto given by the deed of trust, did not take precedence, as operating expenses or costs, over receiver's certificates issued for money to pay claims assigned to classes B. and C. and given the same priority as the claims discharged. The right to such allowance rested on the mortgage contract and was postponed to claims having precedence of those secured thereby.

A. N. Gossett, F. H. Prendergast, T. S. Miller and *A. H. Mc-*

Knight, for appellant.—The court was without power or authority to make an order giving the receiver's certificates priority in payment over the personal allowances made to the plaintiff trustee and the allowances made for the benefit of its counsel and attorneys. Barton v. Barbour, 104 U. S., 134; Miltenberger v. Logansport Ry. Co., 106 U. S., 286; Union Trust Co. v. Illinois Midland Ry. Co., 117 U. S., 434; St. Louis, A. & T. H. Ry. Co. v. Cleveland, C. C. & I. Ry. Co., 125 U. S., 658.

LEVY, ASSOCIATE JUSTICE.—This appeal is one in a series of appeals here by creditors from a decree of the court classifying their claims and directing payment out of the proceeds of sale of the Texas Southern Railway Company properties under foreclosure in receivership proceedings. It is by the United States & Mexican Trust Company, Trustee (now Orient Trust Company), plaintiff in the receivership proceedings, joined by its attorneys, from the final order of the court refusing a motion to direct the payment out of the proceeds of the sale of the railway, as costs, of certain allowances made to the said trustee and its attorneys. The only contesting creditor in the record to the motion of the appellant trustee is the St. Louis Union Trust Company, the holder of the receiver's certificates. A full statement of the receivership proceedings and the issuance of receiver's certificates is given in the appeal of the St. Louis Union Trust Company, this day decided, and here referred to.

It appears that the mortgage deed of trust executed to appellant trustee by the Texas Southern Railway Company to secure bonded indebtedness, and in suit, among other things, provided and agreed that the railway company, in event of suit to foreclose said deed of trust, should be bound for payment, and would pay reasonable attorney's fees, and also personal compensation to the trustee for its services as trustee, and its expenses incurred, and that the same should be secured by the deed of trust. Appellant trustee prayed for such contract compensation in its suit for foreclosure and appointment of a receiver. During the receivership proceedings, and before sale, the court, on said trustee's application therefor and on proof, fixed the amount of such compensation by an order to that effect. This statement is made in the record: "No question was or is made as to the propriety of the amounts of these allowances, and the question on this appeal being as to whether or not they should be paid in preference to receiver's certificates from proceeds of the sale of the corpus of the property, said proceeds applicable thereto being materially insufficient to pay such certificates, and this is to see whether this allowance should be first paid or not."

After stating the case.—Specifications of error, by proper assignments, challenge the ruling of the court in not directing the payment of appellant trustee's demand as costs. To have directed the payment as costs would, in the record, have given the demand the priority payment out of the proceeds of the sale to the detriment of the receiver's certificates in question. The petition in the receivership

proceedings filed by appellant trustee had for its purpose and object a foreclosure of the mortgage on the railway properties, securing the bonded indebtedness, and the appointment of a receiver as a means of placing the properties in the custody of the court for purposes of foreclosure. It could still be said, however, from the record made in the case, that the case as made by many interventions during the proceedings became and was at last an action to adjust the rights and liens and claims of all creditors of the railway company, and that the proceedings were for the benefit of all such persons. In this view, if it could be said from the record that the several allowances made by the court to appellant trustee were made and so classified by the court as compensation to the plaintiff in the action for its expenses and attorney's fees because of equitable grounds that such expenses and attorney's fees inured to the common benefit and use of all persons in the suit, then appellant probably would be warranted in moving for a priority payment as costs. But we feel constrained by the record to the ruling that the compensation so made to the appellant trustee by the court was not made to it on or in right of the equitable ground appearing, but that such compensation was sought by the appellant and the amount fixed by the court in its order, and its payment directed, under and by virtue alone of the contractual clause in the mortgage of the railway company to said trustee providing and agreeing to such compensation. This order makes the question before us one of contract right, and not adjustment of equities. The court's order fixing the compensation, among other things, recites: "There coming on to be heard the request of the plaintiff trustee for allowance to be made at this time for the use and benefit of its counsel and attorneys, T. S. Miller and Cook & Gossett, and for services rendered by them as such in the cause, and it appearing that in the mortgage deed of trust executed by defendant to plaintiff it is, among other things, provided and agreed that defendant, in the event of suit to foreclose said deed of trust, should be bound for payment and would pay reasonable attorney's fees, and also compensation to plaintiff for its services as trustee, and that the same should be secured by said deed of trust; and the court having heard the evidence, and being fully advised in the premises, does now find that the services rendered . . . are reasonably worth," and then proceeds to fix the amounts and classify them as a lien in rank prior to the bonded indebtedness and payable out of the corpus sale "next in rank to class 'C' claims according to the plan of specification adopted in this cause." In this order the court reserved power and jurisdiction to thereafter fix and make allowances to the trustee for its services as trustee, and to make further reasonable allowances to plaintiff for its attorney's fees. On June 20, 1907, and before sale of the properties, the further allowances were made by the court on the application of the trustee, and the order recites: "And the court finds that the plaintiff is entitled to reasonable allowances for its expenses, personal compensation and attorney's and counsel fees, to be paid from the corpus of the property in the mortgage to it by the defendant, by the mortgage deed of trust sued on and foreclosed in this cause." Holding, as we do, that appellant's right to

the compensation allowed it by the court must rest upon its contract with the railway company, and it being a valid contract between the parties thereto, it follows that the power of the court was invoked to fix the reasonableness of the amount of the compensation and to decree its payment as a lien as provided in the contract out of the proceeds of sale. This power the court exercised, as shown, and made the amount determined payable out of the proceeds of the sale as a lien of rank prior to the bonded indebtedness "next in rank to class 'C' claims according to the plan of specification adopted in this cause." Having in its petition sued and prayed for such compensation and allowances, and the court by the decree of March 21, 1905, as referred to, having awarded same under such pleading and the terms of the contract plead, and having fixed the status of its payment out of the corpus sale, and this decree being final, we think, in this respect of its rank of payment, we would not be warranted in ruling that the court erred in refusing to direct the payment of the demand as costs and in a higher rank than the certificates. We have ruled that the certificates were, by the terms of the order authorizing their issuance, payable out of the corpus sale as classes "B" and "C." This was in accordance with the "plan of specification adopted in this cause," as recited in the decree awarding appellant trustee's compensation.

Appellant trustee contends that the final decree of foreclosure of September, 1904, settled and fixed its primary right to payment out of the proceeds of sale in priority of "B" and "C" claims, which the certificates represent, and are by the terms of the order of issuance payable as and in their rank, and that this decree was final. The decree just mentioned was the final decree of foreclosure and under which the sale occurred. The first sale under this decree failed for want of bidders, and was made on a subsequent date, fixed by the court, in 1908. This decree provides that the deed of trust be foreclosed and the property sold, and that out of the proceeds of the sales there should be paid (1) "the cost and expenses of this action, including any and all allowances that the court may hereafter make, and power and jurisdiction and control of the case is expressly retained for such purpose and the determination of such now deferred to a future time." It then provides for the payment of other matters in the order of classification, including "B" and "C" class claims. It also provides that class "A" claims are to be paid from the earnings of the receiver as part of his operating expenses and charges, and, failing the sufficiency of the same, then first from the proceeds of the sale of the mortgaged property then directed to be made. It also provides: "The court expressly reserves jurisdiction and control of this cause for the purpose of fixing, determining and allowing compensation to be allowed to the officers of the court and their assistants, employes and counsel, and for plaintiff's compensation as trustee and expenses of this action and its attorney's and counsel fees, and to direct the same to be paid from the proceeds of said sale." It is these provisions of the decree as quoted above that appellant trustee relies on as fixing the status and rank of its allowances. We do not think the provisions of the decree quoted, properly construed and considered in the light of the issues made in the petition, could be ruled to have

fixed and provided the status and rank that the contractual compensation and allowances to the appellant trustee were to have and occupy as to payment out of the proceeds of sale. The decree, we think, by its terms, in order to make a final judgment disposing of all matters plead in the petition, reserved jurisdiction and power over the same to dispose of, at a later term, the petitioner's prayer for contractual compensation and allowances. It expressly provides that jurisdiction is reserved and retained to determine and fix the compensation to be allowed "for plaintiff's compensation as trustee and expenses of this action and its attorney's and counsel fees, and to direct the same to be paid from the proceeds of sale." If the original decree of foreclosure had failed to dispose of all issues plead, of which this contractual clause in the mortgage in question was one, and had failed to reserve the power and jurisdiction to dispose of such issues, then such decree could not have been held a valid final decree. This reserved power and control over the decree enabled the court to make the decree of allowances to appellant, as plead by it, as supplemental to the original decree and a part thereof. The decree was final except as to the particular matter therein specially reserved for further determination. This further determination, we think, was to fix the primary rights of the appellant, as well as the details thereof. If an appeal had been attempted by any party having such right from the decree of foreclosure upon the ground that the court erred in fixing the status and rank of the appellant's compensation and allowances first out of the corpus sale, it would, we think, have been an appeal without effect. It would have been an appeal without effect, because the decree on its face would show a failure to adjudicate and determine such contractual allowances, and an express reservation of power and jurisdiction thereafter to do so. The provision of the decree provided: "And all allowances that the court may hereafter make and order" should first be paid from the proceeds of the sale. To give effect and proper meaning to the decree in its entirety, this would properly be inferred as meaning such allowances as the court could and would be required to make outside and independent of this particular alleged contractual compensation. Appellant's compensation was not an allowance by the court. It was an amount due and recoverable by express terms of the contract against the railway company, as much so as any other debt or attorney's fees in a note. This supplemental decree, under reserved power and jurisdiction of the court, of March, 1905, it must be ruled, we think, was a final decree, and the part of the foreclosure decree that fixed the status and rank of appellant's demand. This decree being unappealed from, and not set aside by proceedings for such purpose, it became and was final, and could not be changed or modified by the court at a subsequent term. It follows that the order of July, 1907, changing the classification to court costs was without the power of the court to do so, and appellant could not predicate any legal rights upon such order. We are of opinion, therefore, that as the decree of the court properly classified and made payable the demand of appellant "next after the class 'C' claims," and the certificates in question being made payable as "B" and "C" class claims, this court would not be warranted in holding that the court erred in

refusing the motion of appellant to direct payment of its demand ahead of "B" and "C" class claims as costs of court.

The judgment was ordered affirmed.

Affirmed.

Writ of error refused.

TEXARKANA GAS & ELECTRIC COMPANY ET AL. V. MRS. BELLE LANIER ET AL.

Decided February 10, and March 17, 1910.

1.—Impeachment of Witness—Contradictory Statements.

In order to impeach a witness by proof of previous statements contradicting his testimony, they must be called to his attention, so as to afford him opportunity for explanation, and other proof of such previous statements is not receivable where he admits having made them.

2.—Discovered Peril—Charge.

A charge of negligence after discovery of another's peril criticised as assuming the fact that the person charged with negligence realized the other's peril.

3.—Same—Charge.

Where no charge limiting certain evidence to purposes of impeachment was necessary, an instruction that it could be considered for that purpose was on the weight of evidence, and was erroneous.

ON MOTION FOR REHEARING.

4.—Same.

Where evidence of a previous statement by a witness was admitted against him because he was a party, a charge that the jury could consider the same as affecting his credibility was erroneous as to him, being an invasion of the province of the jury.

5.—Same.

Where the testimony given by a defendant on a coroner's inquest was more favorable to defendants than that given on the trial, its admission could not be considered prejudicial to his codefendant unless limited by a charge restricting its effect against the latter to purposes of impeachment, and no such charge was called for in his interest.

6.—Evidence—Impeachment.

Where a witness was questioned in detail on cross examination as to all the statements made in his former testimony, and admitted them all, with explanations that in some he was mistaken, the written testimony is not then admissible. His previous statements can be proved for impeachment only when he denied making them, or when, he admitting generally that the testimony was given, the writing was necessary to show what he so admitted having sworn.

7.—Charge—Weight of Evidence.

Trial courts have no right to refer in their charges to the testimony of any particular witness or to testimony to any fact or group of facts unless this becomes essential to the protection of some right of one or more of the parties.

8.—Same.

Where a judgment is supported by only a slender margin of evidence slight deviation from the rule prohibiting charges on the weight of evidence may be cause for reversal.

Appeal from the District Court of Bowie County. Tried below before Hon. P. A. Turner.

Glass, Estes, King & Burford, for appellants.—Where a witness has made certain statements at a certain time and place and testifies and admits that he did make such statements at such time and place, it is error to prove by other witnesses that he did make said statements. Rodriguez v. State, 23 Texas Crim. App., 503; Wyatt v. State, 38 Texas Crim. App., 256.

Maddox, the motorman, in addition to seeing Lanier on the track and realizing his danger, must have realized that the said Lanier would not or could not extricate himself from the danger. San Antonio Traction Co. v. Kelleher, 48 Texas Civ. App., 421; Missouri, K. & T. Ry. Co. v. Light, 54 Texas Civ. App., 481; San Antonio & A. P. Ry. Co. v. McMillin, 100 Texas, 562; Galveston, H. & S. A. Ry. Co. v. Wirtz, 55 Texas Civ. App., 555; Pillow v. Texarkana & Ft. Smith Ry. Co., 55 Texas Civ. App., 597.

Smelser & Vaughan and *P. G. Henry,* for appellees.—Declarations of a party to the suit are admissible against him without laying a predicate to impeach him, in fact, even though he may never testify. Wells v. Fairbanks, 5 Texas, 584; Edwards v. Osman, 84 Texas, 659; Sterling v. De Laune, 47 Texas Civ. App., 470; Morgan v. Tims, 44 Texas Civ. App., 308; McKay v. Elder, 92 S. W., 268; Contreras v. San Antonio Traction Co., 83 S. W., 870.

While the inquest testimony of Maddox was clearly admissible, it could not legally be considered, except in passing on his credibility. Weir v. McGee, 25 Texas Supp., 20; Halsell v. Decatur Cotton Oil Co., 36 S. W., 848; Spiars v. Dallas Cotton Mills, 32 S. W., 777; Bekkeland v. Lyons, 96 Texas, 225; Henson v. King, 47 N. C., 385; Black v. Marsh, 67 N. E., 201; Sprague v. Bond, 113 N. C., 551; Sprague v. Bond, 18 S. E., 701; Burton v. Wilmington Ry. Co., 84 N. C., 192; Georgia Home Ins. Co. v. Kelley, 113 S. W., 882; Owensboro City St. Ry. Co. v. Allen, 108 S. W., 357; Missouri, K. & T. Ry. Co. v. Cherry, 44 Texas Civ. App., 232.

The charge was not upon the weight of the testimony, nor subject to any of the objections urged against it by appellants. Flannigan v. State, 53 S. W., 113; Dobbs v. State, 113 S. W., 922; Lacoste v. Bexar County, 28 Texas, 422; Collins v. State, 5 S. W., 848; International & G. N. R. Co. v. Stewart, 57 Texas, 170; Jones v. State, 13 Texas, 175; Jacobs v. Totty, 76 Texas, 437; Costley v. Galveston City Ry. Co., 70 Texas, 113; Gulf, C. & S. F. Ry. Co. v. Pettis, 69 Texas, 692; Wright v. Thompson, 14 Texas, 563; Cox v. Shropshire, 25 Texas, 125; Melendy v. Town of Bradford, 56 Vt., 148; Rankin v. Thomas, 50 N. C., 435; Bank of Huntington v. Napier, 23 S. E., 800; St. Louis S. W. Ry. Co. v. Ford, 56 Texas Civ. App., 521; Jones v. Thurmond, 5 Texas, 328.

Submitting the issue of whether or not the engineer "discovered the peril of the trespasser" would be sufficient, and would submit the issue whether or not the engineer realized that the trespasser probably would not get off the track. Texas & P. Ry. Co. v. Roberts,

91 Texas, 535; Houston & T. C. Ry. Co. v. Harvin, 54 S. W., 631; St. Louis S. W. Ry. Co. v. Cockrill, 111 S. W., 1092; Galveston, H. & S. A. Ry. Co. v. Murray, 99 S. W., 151; International & G. N. R. Co. v. Sein, 11 Texas Civ. App., 386; International & G. N. R. Co. v. Tabor, 12 Texas Civ. App., 283; Galveston, H. & S. A. Ry. Co. v. Zantzinger, 49 S. W., 678; Houston & T. C. Ry. Co. v. Finn, 107 S. W., 94; International & G. N. R. Co. v. Munn, 46 Texas Civ. App., 276.

HODGES, ASSOCIATE JUSTICE.—The appellees are the surviving widow and children of Charles Lanier, who was killed in a collision with a street car in the city of Texarkana on April 24, 1907. The appellants are the company that owned and operated the street car line at the time, and the motorman who was in charge of the car that ran over and killed deceased. The suit is to recover damages for the death of Lanier. A trial in the court below resulted in a verdict against the appellants for $10,000.

The testimony showed that Lanier was struck and killed at a point where Fourth Street, the one occupied by the car line, was intersected by Congress Street. Fourth Street runs east and west, and Congress Street north and south. The car was going east, and Lanier approached from the south. Two vehicles going in opposite directions met just east of the east line of Congress Street, so that the rear of the one going east was about on a line with that side of Congress Street. The drivers of the vehicles stopped them at that point for the purpose of permitting the street car, which they saw approaching, to pass, the space between the sidewalk and the car line being too narrow to permit passage without one or the other going upon the car line. The animal hitched to the vehicle going west, meeting the car, appears to have attracted some attention on account of his indisposition to stand still. The distance from the south side of Fourth Street, including the sidewalk, to the south rail of the car line was about twenty-seven feet, the space occupied by the sidewalk at that place being unusually wide and upon an elevated portion of the ground. There was nothing in this space between the south side of Fourth Street and the car to obstruct Lanier's view of the car, or the motorman's view of him while in that space. It seems that as Lanier approached the track he was looking at the restless horse, and did not notice the car. The witnesses differ as to the distance he was from the car when he stepped on the track; one of them testified that the car was six or eight feet away; others say the distance was shorter. The motorman testified that he was running the car at about five or six miles per hour; that he rang his bell when about 100 or 150 feet west of the junction of the two streets, the point where Lanier was killed; that he did not ring it again because his attention had been attracted to one of the horses above referred to, which appeared to be restless, and he thought it probable that it might be frightened by the noise of the bell. He also says he did not see Lanier till the latter stepped upon the track about five or six feet in front of the car; that he then did not ring the bell because he did not have time, but did

everything in his power to stop the car and avoid the collision. The car was at the time going down a slight grade, and was stopped within about thirty-five or forty feet after Lanier was struck. Mrs. Lanier testified that her husband's hearing was defective, and that she had previously cautioned him about crossing the street car line.

The only grounds of negligence submitted by the court were those based upon discovered peril. There was testimony tending to show that, considering the rate of speed at which the car was traveling, it could have been stopped within the distance intervening between it and Lanier after he got on the track, or its speed so checked that injury might have been avoided. The testimony also justifies the conclusion that the motorman could and probably did see Lanier before he got upon the track and while he was approaching it, it being reasonably evident that Lanier must have passed directly between the motorman and the vehicle which he asserts he was observing.

In view of the fact that this judgment must be reversed upon other grounds, it will not be necessary to discuss the assignments questioning the sufficiency of the evidence, or that complaining of the verdict as being excessive.

At the inquest held over the body of Lanier, Maddox, the motorman, made the following statement, which was reduced to writing and signed by him:

"E. C. Maddox, being duly sworn by me, testified as follows: At about 6:12 p. m. on the 24th day of April, 1907, car No. 1, owned and operated by the Texarkana Gas & Electric Company, and which car was in my charge as motorman, ran over Thomas G. Lanier and drug him about a car length. The point at which the car ran over him was at the corner of Congress Avenue and 4th Street, in Texarkana, Bowie County, Texas. I was running the car at a speed of from seven to eight miles an hour and was running at this speed, which is about four miles per hour under the usual speed, because I noticed a buggy going east and a buggy going west and they met right at the crossing and a man stepped right out from behind the buggies and attempted to cross in front of the car and I was in three or four feet of him before I saw him and was unable to control the car in time to keep from running over him in that distance, and I used every effort in my power to prevent the accident. He was going north when the car struck him, he was in the middle of the track and ran directly over him. My car had a fender on it, but apparently did no good, for the reason that at the place where he was run over the dirt between the rails had been washed out and when he was knocked down the fender was then for this reason too high to lift him off the track and failed to afford any protection whatever.

"Have had about one year's experience in running electric cars and our particular instructions are to keep a good lookout in front. My experience is that a car running from seven to eight miles an hour can not be stopped under thirty-five feet and in this distance, as the brakes were partly set, I rang the bell and reversed the car and

threw the brakes fully on, which was all that I could have possibly done.

"He was not killed outright, but was taken up by the barnman, who lives at College Hill, in Texarkana, Ark., and carried to the sidewalk. I came in after the ambulance and he was carried to his home. Dr. Beck was called and attended upon the injured man from the track to the house. I was told that Mr. Lanier died about an hour after he was run over by the car.

"(Signed) E. C. Maddox."

On the trial in the District Court Maddox was subjected to a rigorous cross-examination regarding his statements made at the inquest, and his attention was called to the discrepancies between those statements and his testimony given upon the trial. It appears from the record that there had been a previous trial in the court below, in which Maddox's testimony was taken down by the court stenographer; and upon the trial from which this appeal is prosecuted the stenographer's report was used, Maddox not appearing in person. The variance between Maddox's testimony at the inquest and that given upon the trial appears to be mainly as to the rate of speed at which the car was traveling and the ringing of the bell. The witness admitted making the statements at the inquest, and gave his own explanation of the variance, saying that he was in error when testifying on that occasion. After the defendants in the court below had concluded their testimony, the appellees offered in evidence the written statement containing Maddox's testimony at the inquest. This was admitted over the objection of the appellant, Texarkana Gas & Electric Company. The action of the court in admitting this testimony is assigned as error. In this connection complaint is also made of the following portion of the court's charge: "Plaintiffs in this case read in evidence the written evidence of E. C. Maddox taken at the inquest trial held by the justice of the peace over the body of said Lanier. This is original evidence as against the defendant, Maddox, and may be so considered by you. But this evidence is not original evidence as to the defendant company, and can't be so considered by you. But if you believe that said evidence of Maddox differs from his evidence as given by him on this trial, and contradicts or tends to contradict his evidence, then I charge you that you may consider such evidence of said Maddox at the inquest in passing on his credibility as a witness in this case and weighing his evidence, but you can consider it for no other purpose as to the defendant company." In offering this testimony the appellees did not specify the purpose for which it was intended. The charge of the court would seem to indicate that it was offered both as substantive evidence against Maddox, one of the parties to the suit, and also for the purpose of impeaching him as a witness. We fail to see how its introduction would tend to establish any ground of negligence relied upon for a recovery not fully and completely covered by other testimony about which there was no dispute. Upon the issue of discovered peril it seems to us that it weakens rather than strengthens the plaintiffs' cause, in that

it shows a greater rate of speed in the car, and necessarily a greater difficulty in avoiding the collision after discovering the peril of the deceased. It also shows that the bell was sounded, whereas one of the grounds of negligence relied upon was the failure to perform that duty. These facts, however, would not affect its admissibility as substantive evidence, but only its probative value. We may therefore concede that as to Maddox it was admissible as substantive evidence of some material fact relied upon for recovery. But we do not think under the circumstances it was admissible for the purpose of impeaching him as a witness. Upon his cross-examination Maddox had his attention called to all of the material portions of his statements made at the inquest, and in every instance he admitted making them. Having done this, there was no occasion to then offer in evidence the written statement for the purpose of showing these variant statements. If there was anything contained in the writing which had not been called to his attention and which might affect his credibility as a witness, that fact furnished an additional reason why the writing should not have been admitted. In view of the fact that Maddox was not present upon the trial, neither he nor his codefendant had any opportunity to explain the other discrepancies which had not been primarily called to his attention. The rule seems to be well settled that where it is sought to impeach a witness by showing that he had made statements upon another occasion at variance with his testimony given upon the trial, he should have some opportunity of explaining the discrepancies. If the matter has not been called to his attention and a predicate laid for impeachment, certainly he could not be denied the opportunity to be subsequently called to the stand and make such explanations as he may be able to give. Weir v. McGee, 25 Texas Supp., 32. It is the general rule that in order to impeach a witness by showing that he has made statements at another time different from those made upon the trial, a predicate must first be laid by calling his attention to the former statements. If when this is done he admits having made them, the party attacking him has then no occasion to offer in evidence the testimony by which it expects to prove the inconsistent statements. International & G. N. Ry. Co. v. Boykin, 99 Texas, 259, 89 S. W., 639; 7 Ency. Ev., 96, and cases cited. In our opinion the cross-examination brought out all of the material points embodied in the testimony given at the inquest by Maddox, and we are inclined to regard the action of the court in admitting the writing itself as practically harmless, and insufficient alone to justify a reversal. The court, however, told the jury they might consider this instrument in passing upon the credibility of Maddox. If the instrument was not admissible for that purpose, then it is clear that the jury should not have been permitted to so consider it. But assuming that the testimony was admissible both as substantive evidence against Maddox and for the purpose of his impeachment as a witness, we think the court should not have given this charge. The rule which makes it permissible and proper for the court to limit testimony admitted before the jury is usually confined to those instances where the admitted testimony may be used

by the jury for an illegitimate purpose, and such limitation is intended as a protection to some right belonging to the opposing party. If this writing contained any statements which the jury might construe as contradicting the defense relied on by the appellant, Texarkana Gas & Electric Company, that defendant would have had the right to an instruction limiting the evidence to the particular purpose of impeachment, if it were properly admissible for that purpose; but where the evidence had no such effect and could not have prejudiced that appellant's defense, a charge calling the attention of the jury to the fact that they might consider it in passing upon the credibility of the witness was just as much on the weight of the evidence as if the court had made a similar reference to any other portion of testimony introduced for impeaching purposes and which could have had no such ulterior effect. Under the issues submitted upon which a recovery could be had the testimony of Maddox was of vital importance to the appellants, and any unauthorized action by the court which even in a slight degree may have affected the consideration which the jury might give in weighing his testimony may have determined the question of liability. While it may be true that the jury had the right to consider this evidence in passing upon the credibility of Maddox, the wrong consisted in telling them so when the occasion had not arisen that called for such an instruction.

The fourth and fifth assignments of error object to certain portions of the court's charge as being upon the weight of the evidence in assuming that Maddox, the motorman, realized the danger of Lanier before he was struck and while approaching the track, and also while on the track in front of the car. We think the charge subject to the criticisms urged. This objection should be avoided upon another trial.

The remaining assignments do not require discussion, and are overruled. But for the errors pointed out the judgment of the District Court is reversed and the cause remanded.

Reversed and remanded.

ON MOTION FOR REHEARING.

The appellees have filed a lengthy motion for a rehearing, in which counsel have ably and exhaustively discussed the grounds upon which the reversal of the judgment of the court below was placed. We have again given those questions a careful consideration, and are unable to discover any good reason or judicial authority for reversing our former holding. It may be that in stating the views of the court the writer did not make them as clear as he should have done, and that this has to some extent detracted from the weight of the reasons governing the court's conclusions.

As before stated, we think the written testimony of Maddox given at the inquest was not, under the circumstances attending this trial, admissible. Still, its admission alone might not justify a reversal of the judgment. The discussion of this question in the appellees' argument proceeds upon the assumption that the written instrument

was not only properly admissible, but that its evidentiary nature was such as entailed upon the court the duty to limit its effects in the manner he did. This last contention is based upon the hypothesis that Maddox's testimony at the inquest, if not limited to impeaching purposes as to the appellant company, would operate to its prejudice in the minds of the jury. Maddox was a party to the suit as well as a witness in the case. Therefore any statements which he made previous to the trial, whether in harmony, or in conflict, with his testimony, and which tended to establish any of the material facts upon which the appellees relied for a recovery, were admissible against him as substantive evidence. If offered for that purpose the writing was before the jury to be considered by them generally as to his liability at least, just as they would consider any other substantive evidence offered. If the testimony was favorable to Maddox, or more so than that he gave upon the trial, he had the right to the benefit that might result from its consideration in that light. The fact that it was his own declaration made at another time, and from the standpoint of substantive evidence, hearsay or self-serving, did not affect his right to have it considered generally without any restrictions. Davidson v. Wallingford, 88 Texas, 619, 32 S. W., 1030. Notwithstanding this inquest testimony is offered by the appellees without any restrictions as to the purposes for which they desired it considered by the jury, and its admission over all the objections made by the appellant company, the court told the jury, "This is original evidence *against* the defendant Maddox, and may be so considered by you." Then follows a charge restricting their consideration of it as against the appellant company solely to passing upon the credibility of Maddox as a witness. The portion of the charge quoted unequivocally told the jury, in effect, that the facts stated in the written instrument tended to disprove the defense interposed by Maddox, and was in that respect a charge upon the weight of the evidence, of which Maddox now has a right to complain. Without reference to any other feature of the case, this error alone would, we think, require a reversal of the judgment as to Maddox. But the court did not stop here. He continued: "But if you believe that said evidence of Maddox differs from his evidence as given by him on this trial, and contradicts or tends to contradict his evidence, then I charge you that you may consider such evidence of said Maddox at the inquest in passing on his credibility as a witness in this case and *weighing his evidence* (italics ours), but you may consider it for no other purpose as to the defendant company." Maddox, the party defendant, had the same right to complain of an illegal assault upon the credibility of Maddox the witness as did his codefendant. Maddox the party, when a witness, could be assailed only through those legal avenues marked out for attacking the credibility of witnesses in general. Browning v. Gosnell, 91 Iowa, 448, 59 N. W., 340. His partisan connection with the litigation in no way deprived him of that guaranteed protection. He therefore occupies in this appeal a position of equal advantage with his codefendant in complaining of the latter portion of the charge quoted above. Considering that the inquest testimony of Maddox was ad-

missible as substantive evidence as to him, was it also admissible for the purpose of impeaching him as a witness? Not unless it was essential in getting before the jury some material fact, not otherwise presented to them, which would tend to show that Maddox was swearing falsely upon the trial. If Maddox at the inquest made statements as to how this accident occurred so materially at variance with what he testified to on the trial as would probably detract from his credibility, the appellees were clearly entitled to have those variant statements considered along with his subsequent testimony. The inquest testimony having been reduced to writing and signed by the witness, a sufficient predicate might have been laid for its introduction by merely showing the writing to the witness and eliciting from him an admission that he had made the statements therein contained, or a denial in whole or in part. If the witness admitted the correctness of the written instrument as an account of his previous testimony, the document might have been offered and admitted in evidence without any further questioning upon that subject. But counsel for appellees elected to adopt a different method of acquainting the jury with the fact that Maddox had given a different account of this occurrence when testifying at the inquest. On cross-examination Maddox was asked in detail as to all the material variances between his testimony in chief on the trial and his statements made at the inquest. In every instance he so unequivocally admitted the variant statements and their inconsistency that there was no occasion, in order to get those facts before the jury, for resorting to the introduction of the instrument itself. The material points of variance consisted of his statements as to the rate of speed at which the car was moving, the distance the deceased was from the car when first discovered by Maddox, and the time when the gong was sounded. At the inquest Maddox stated that his car was going seven or eight miles per hour, which was about four miles under the usual speed; that he did not see the deceased till the latter stepped on the track about three or four feet in front of him; that he then rang the bell and did everything he could to stop the car. On the trial he testified that his car was going at the rate of about five or six miles per hour; that the deceased was five or six feet in front of the car when he was discovered; that witness then did not ring the bell because he did not have time, but reversed his car and did all he could to stop it. In that connection he stated on the trial that he rang the bell about 150 feet before getting to the crossing where the collision occurred, and did not again ring it before the accident happened. The court submitted the case to the jury upon the issue of discovered peril alone, assuming, we suppose, that the deceased was guilty of contributory negligence as a matter of law. Looking at the two accounts of the killing of deceased as affecting the liability upon the issue of discovered peril, we think the testimony of Maddox on the trial was an account much less favorable to him and his codefendant than the testimony he gave at the inquest. The conflict, therefore, so far from necessarily discrediting the veracity of the witness, might tend to show a conscientious effort at the time of the trial to tell the exact truth, notwithstanding

its more damaging consequences. The language of the court in telling the jury that they might consider the conflict, if any there was, in passing upon the credibility of Maddox, when taken in connection with the preceding portion of the charge, we think, contained an intimation to the jury that in the mind of the court this conflict would operate to impair the credit of Maddox as a witness. The variant statements having been offered by the opposing party in the presence of the jury and over the objection of one of the appellants, would logically be expected to have that effect, and such a construction would likely be given the charge.

But passing to the consideration of the objection to the court's charge from another standpoint, and the one discussed to some extent in the original opinion, we think the appellants were prejudiced by the effort to limit the consideration which the jury might give to this inquest testimony. As a general rule, trial courts have no right to refer in their charges to the testimony of any particular witness, or to the testimony as to any isolated fact, or group of facts, unless this becomes essential to the protection of some right of one or more of the parties to the suit. Violations of this rule are usually condemned as charges upon the weight of the evidence. The necessity for the rule is founded upon the fact that the testimony which is limited to a particular purpose is legally incompetent for any other, but in the minds of uninformed jurors may tend to establish other and material issues, to the detriment of the opposite party. The most common application of the rule occurs in cases where testimony incompetent for any other purpose is offered for the impeachment of a witness. There is another rule equally as important and as universally enforced as the one above mentioned, and that is that variant statements can not be used for purposes of impeachment unless they refer to material issues involved in the case on trial. While the mere fact that a witness has made conflicting statements on different occasions might ordinarily impair his credibility, it would not be permissible to attack his credit by merely showing that he made a conflicting statement, without reference to its materiality. If the conflicting evidence admissible for impeaching purposes must be material to the issues in controversy, then it logically follows that it might tend to prove some material issue for which it could not be legally employed. Thus it will be seen that the exception which permits a departure from the general rule, regarding references to the evidence in the charge of the court, is founded upon an essential duty—that of protecting the opposite party from the illegitimate consequences of testimony otherwise material and relevant. Clearly, then, where the conditions calling for the exception are absent the general rule should be observed, and the jury permitted to exercise its own judgment in considering the testimony. The authority to specifically refer to and direct the use to be made of particular evidence is the product of, and is commensurate only with, the right of the opposite party to this protection against its practical, but illegitimate, tendencies. Neither of the appellants sought to have this testimony so limited, and without any request upon their

part the court was not required to do so, had it been a case where it was proper.

Counsel for appellees insist with much earnestness that the effect of this inquest evidence was damaging to the defense urged by the appellants. We do not agree to this contention. There was not a fact in it which in any way affected the defense that was not established beyond dispute by the witnesses for the defendants before this instrument was offered. As before stated, so far from operating to the prejudice of the defendants, we think it tended to strengthen their defense upon the very question in issue. They had nothing to lose, but everything to gain, by having the jury consider it generally for all purposes. On the contrary, they had everything to lose and nothing to gain by having its consideration restricted to impeaching purposes. The importance of Maddox as a witness in this case was such that the jury could not have returned the verdict it did without disregarding his testimony in every essential respect. In view of the slender margin of evidence upon which this judgment can be supported, we think only a slight deviation from the rule prohibiting a charge upon the weight of the evidence sufficient to justify, if not to require, a reversal. It might be that upon other issues which the court did not submit a stronger case upon the facts might have been presented, but that question is not before us.

It is unnecessary to discuss the other question upon which the reversal of the judgment was based. Speaking for himself alone, the writer is frank to admit that reversing judgments upon the grounds last referred to in the original opinion is justified more upon precedents established by the courts of last resort than upon any sound principle. The motion is overruled.

G. A. KELLY PLOW COMPANY v. R. W. LONDON.

Decided February 10, 1910.

1.—Contract of Employment—False Representation—Position of Trust.

One seeking and obtaining employment in a position of trust and confidence impliedly warrants that he is an honest man, and the discovery by the employer of the fact that he had obtained the employment by false representations showing a lack of moral qualities and untrustworthiness would be ground for his discharge though the representations did not relate to or affect the employer's business, and there had been no breach of contract by the employee.

2.—Same—Case Stated.

To an action for wrongful discharge of plaintiff from the position of manager of sales for an implement company with power to direct the movements of traveling salesmen and the prices of goods, which position plaintiff held under a contract for a fixed salary for five years, defendant alleged in answer that the position was obtained by false and fraudulent representations by plaintiff as to the salary he was then getting from his employer, a company engaged in similar business, and his standing with such company and the offers made by it for the purpose of retaining him in its service, and that he was discharged by defendant on learning of the falsity of such representations. Plaintiff excepted on the ground that the representations alleged were

immaterial, in no way affecting defendant's business, which was not charged to have suffered in consequence. Held that the exceptions were properly overruled.

3.—Fraud—Condonation—Charge.

Where the employee was discharged from a position of trust and confidence because of the discovery by the employer of facts affecting his character for honesty, though not, so far, affecting the master's business, a charge that a retention in his employment and failure of the employer to discharge on learning the facts, would condone the matter and deprive the employer of the right to discharge on such ground, was erroneous. The question of condonation or continued right to discharge was one of fact to be determined by the jury. Dishonesty, like incompetency, is a continuing condition, and the right to discharge therefor not lost by retention in employment under circumstances not amounting to equitable estoppel.

4.—Discharge of Employee—Measure of Damages.

The action being for wrongful discharge of an employee under a contract for five years' service and who had thereafter obtained other employment for a like term at a less compensation, it was improper to charge that the measure of damages, the five years not having expired, would be the difference in the compensation under the respective contracts. Other matters, such as the character of the two contracts, the situation of the parties, uncertainty of life or ability to perform, prospects for promotion, etc., should be considered; and not the difference in wages to be earned, but the value of such difference as a present payment should be considered, where the compensation was for loss of a contract having several years of performance yet to run.

5.—Charge—Weight of Evidence.

A charge that the act of one employed in a position of trust in defrauding a third party could not justify his discharge by his employer was upon the weight of evidence and improper.

6.—Evidence—Personal Injury—Derailment of Train.

On the question whether a passenger seated in a railway coach which was derailed received any serious injuries thereby, evidence as to the effect of the shock on other passengers, seated or standing, was admissible to show the extent of the jar.

7.—Contract—Writing—Parol Evidence.

Though a written contract showed the compensation for services agreed on, evidence of a parol agreement that a part thereof was to be returned was admissible.

8.—Evidence—Letters.

The admission of a part of the contents of letters not necessary to an understanding of the portions thereof relevant to the issues was unwarranted, but is held harmless and not ground for reversal.

9.—Evidence.

In an action for damages by wrongful discharge of plaintiff, evidence of the salary he was receiving from another employer four years previously and of the salary offered by the employer to another to take his place after his discharge was irrelevant and improperly admitted.

Appeal from the District Court of Gregg County. Tried below before Hon. W. C. Buford.

Young & Stinchcomb, for appellant.—It was a question of fact for the jury to determine as to whether or not the appellant con-

doned the actions of the appellee by retaining him in service after knowing of his false representations and misconduct. Hughes v. Toledo Scale Co., 86 S. W., 895; Parks v. Tolman, 87 S. W., 576; Jones v. Trinity Parish, 19 Fed., 59; Lord v. Goldberg, 22 Pac., 1126; 26 Cyc., 989; McMurray v. Boyd, 25 S. W., 505; Jonas v. Field, 3 So., 893; Wood on Master and Servant, secs. 114, 115, 118 and 123; Wyatt v. Brown, 42 S. W., 478; Shute v. McVitie, 72 S. W., 433.

The measure of damages in a suit for a breach of contract of employment by an employe is the amount of damages suffered, if any, up to the time of the trial. Pacific Exp. Co. v. Walters, 42 Texas Civ. App., 354; Litchenstein v. Brooks, 75 Texas, 196; Southwestern Tel. & Tel. Co. v. Bross, 45 S. W., 178; Mudgett v. Texas T. T. G. Co., 61 S. W., 149; Lee v. Dow, 51 Atl., 1072.

The appellee's special charge No. 6 is upon the weight of the testimony, in that it instructed the jury that if they found that the appellee was injured, regardless of the extent, and that he practiced a fraud for the purpose of obtaining the settlement with the railway company he did, the appellant would have no right to discharge him for his misconduct in practicing a fraud on the railway company. Wyatt v. Brown, 42 S. W., 478; Wood on Master and Servant, sec. 118, last of paragraph.

The witness W. D. Young, the appellee, the Pullman conductor and one or two ladies were all in the car, and testimony as to the effect the accident to the car had on each of them should be admissible. Pacific Exp. Co. v. Walters, 42 Texas Civ. App., 354; Lichtenstein v. Brooks, 75 Texas, 196.

Lacy & Bramlette and *U. F. Short,* for appellee.—To authorize the rescission of a contract for fraud, the representation charged to be false must relate to a material matter constituting an inducement to the contract, and must relate to the subject of negotiation between the parties. Carson v. Houssels, 51 S. W., 290; Culbertson v. Blanchard, 79 Texas, 486; Williams v. McFadden, 11 Am. St. Rep., 345; Mechem on Sales, sec. 874; Stone v. Robie, 29 Atl., 257; 9 Cyc., 425; Leiker v. Henson, 41 S. W., 862; American Bld. & L. Assn. v. Bear, 67 N. W., 500; Deming v. Darling, 148 Mass., 504; McCord Collins C. Co. v. Levi, 21 Texas Civ. App., 109; People v. Healy, 15 Am. St. Rep., 90; Daw v. Morris, 14 Am. St. Rep., 404; Hedden v. Griffin, 136 Mass., 229; Dawe v. Morris, 21 N. E., 313; Greenawalt v. Rogers, 91 Pac., 526; Adams v. Schiffer, 7 Am. St., 202.

The adjustment with the railroad company of the damages which the plaintiff claimed to have sustained in the wreck, however unfair to said company, in no way affected the nature of the plaintiff's employment by the defendant, and said defendant's business was not injured thereby. 26 Cyc., 990, 991; Child v. Boyd, 56 N. E., 609; Freeman v. Bourne, 39 L. R. A., 510; Ulrich v. Hower, 27 Atl., 243; Milligan v. Sligh F. Co., 70 N. W., 133; Wood on Master and Servant, 2d ed., 110; Larkin v. Hecksher, 3 L. R. A., 137.

The salary that plaintiff was receiving in the year 1903, four years

before the negotiations which resulted in the agreement sued on, was irrelevant and incompetent for any purpose. (17th cross-assignment.)

Any offer upon the part of the defendant to hire the services of Leroy Trice as manager of its salesmen at any price was incompetent for any purpose, and the testimony of such offer should have been excluded. (21st cross-assignment.)

The written contract made between the plaintiff and the defendant established the salary which the plaintiff was to receive for his services. The evidence offered and admitted by the court showing he was to receive a different salary or that a portion of the salary paid to him was to be refunded, varied the terms of the writing and should have been excluded. Rockmore v. Davenport, 14 Texas, 604; Bedwell v. Thompson, 25 Texas Supp., 246; Donley v. Bush, 44 Texas, 7; Belcher v. Mulhall, 57 Texas, 19; Todd v. Roberts, 1 Texas Civ. App., 8; Brown v. Wiley, 20 Howard, 448; Willis v. Byars, 2 Texas Civ. App., 134; Sanborn v. Murphy, 86 Texas, 441; Crouch v. Johnson, 7 Texas Civ. App., 435; Reid v. Allen, 18 Texas, 248; Smith v. Garrett, 29 Texas, 52; Bigham v. Talbot, 51 Texas, 453; Aultman v. McKinney, 26 S. W., 268; Peak v. Blythe, 1 Texas Civ. App., 12; Gulf, C. & S. F. Ry. Co. v. Jones, 82 Texas, 160; Janes v. Ferd Heim Brew. Co., 44 S. W., 896; Bupp v. O'Connor, 1 Texas Civ. App., 328; Saunders v. Weekes, 55 S. W., 33.

Defendant retained the plaintiff in its service and paid him the salary stipulated in the contract sued on for a period of six months after it had learned all the facts concerning the alleged misrepresentations by which it was induced to enter into said contract, and after the settlement with the railroad company which it alleges evinced such moral turpitude as justified the plaintiff's discharge. By so doing it condoned all the faults complained of and waived its right to discharge for either cause. Fitzpatrick v. McLaney, 44 So., 1023; McMurray v. Boyd, 25 S. W., 505; Auld v. Travis, 39 Pac., 357; Reynolds v. Hart, 94 Pac., 15 Dunn v. Steubing, 24 N. E., 315.

The measure of the plaintiff's damage, if wrongfully discharged from the defendant's employment, was the difference between the salary which defendant had contracted to pay him and that he was to receive from the Parlin & Orendorff Implement Company under his contract with it for the remainder of his term. Litchenstein v. Brooks, 75 Texas, 196; Roberts v. Crowley, 7 S. E., 740; Cemetery Assn. v. Weisenmann, 28 N. E., 834; Baltimore Baseball Club v. Pickett, 44 Am. St., 304; Pierce v. Tennessee, C. I. & R. Co., 173 U. S., 1; East Tenn. V. & G. R. Co. v. Staub, 7 Lea, 397; Blumenthal v. Bridges, 120 S. W., 975; Martin v. Everett, 11 Ala., 375; Lake Erie & Western R. R. Co. v. Tierney, 29 Ohio C. Ct. Rep., 83, 80 N. E., 1128; Larkin v. Hecksher, 3 L. R. A., 137; Van Winkle, v. Satterfield, 23 L. R. A., 853; McMullan v. Dickinson, 51 Am. St. Rep., 511; Olmstead v. Bach & Son, 22 L. R. A., 74; Parker v. Russell, 133 Mass., 74; Schell v. Plum, 55 N. Y., 592; Sedgwick on Damages, 8th ed., sec. 666; Hamilton v. Love, 71 Am. St. Rep., 384; 26 Cyc., 998, 1001.

HODGES, ASSOCIATE JUSTICE.—This suit was instituted in the

court below by the appellee against the appellant to recover damages for the breach of a contract. The petition alleges, substantially, that on the 1st day of July, 1907, the appellee entered into a written contract with the appellant by which he was employed for a period of five years from that date, at a monthly salary of $333.33, payable monthly; that the services to be rendered by him required him to take charge of, manage and direct the salesmen employed in the appellant's business; that after the contract was entered into he began the performance of his duties and rendered the services for which he was employed, until the 4th of April, 1908, at which time he was, without any cause or excuse, discharged from the service of the appellant; that he forthwith thereafter sought employment, and finally succeeded in making a contract with the Parlin & Orendorff Implement Company for five years beginning April 15, 1908, for the sum of $1350 for the unexpired portion of that year, and $200 per month thereafter. He sued for the difference between what he would have earned in the five years' service under his contract with the appellant, and what he shall have earned at the end of the term of service under his present contract. The appellant answered by a general denial, and specially answered, among other things, that the appellee procured the appellant to enter into the contract by reason of false and fraudulent representations made by the appellee concerning the salary that he was theretofore receiving from the Parlin & Orendorff Implement Company in that during his negotiations for the contract with appellant he represented that he was receiving from said Parlin & Orendorff Implement Company the sum of $250 per month as a salary, while in truth and in fact he was only receiving the sum of $200 per month; that during the negotiations he also represented that the Parlin & Orendorff Implement Company had offered to raise his salary to the sum of $300 per month if he would remain in its service, and again offered to raise his salary to the sum of $4,000 per year if he would remain, and further offered if this was not satisfactory to let the appellee go to the bookkeeper and state the salary he desired and that the Parlin & Orendorff Implement Company would be governed thereby; while in truth and in fact the said implement company had only offered to raise his salary from $200 per month to $250 per month if he would remain in its service; that he falsely and fraudulently represented that the manager of the Parlin & Orendorff Implement Company had called his attention to a telegram which he claimed to have received from W. H. Parlin, the president of the implement company, when he (the appellee) reentered its service, congratulating him upon said reentry into the service of the implement company and advising him never to leave said company again, while in truth and in fact the appellee had never received any such telegram from W. H. Parlin and no such message was mentioned to the appellee or brought to bear by the manager of the Parlin & Orendorff Implement Company. That the appellee on August 6, 1907, was on a passenger train on the Texas & Pacific Railway that was derailed and wrecked, and that the appellee falsely and fraudulently represented that he received serious and permanent personal injuries in

such wreck, and refused and declined to render any service to appellant by reason thereof from August 6, 1907, to October 7, 1907, during which time his services were most needed; and that appellee falsely and fraudulently represented to the Texas & Pacific Railway Company that he was seriously and permanently injured in said wreck, and by reason of said false and fraudulent representations caused the said Texas & Pacific Railway Company to pay him $4,100 damages on account of said injuries, while in truth and in fact he received no injuries whatever in said wreck; that the appellee was disloyal to the appellant in his services for it, was incapable of properly handling the position for which he was employed. It was also alleged that the contract entered into by the appellant and the appellee was a verbal one and in violation of the statute of frauds; that the false and fraudulent representations to the appellant, and his fraudulent transactions with the Texas & Pacific Railway Company were inconsistent with his employment with the appellant, which required a trustworthy and truthful man, and were likely to be injurious to the appellant; and by reason of the facts stated in the appellant's answer the appellee was discharged within a reasonable time after the appellant ascertained the fact that those representations were false and fraudulent and that his transactions with the Texas & Pacific Railway Company were also false and fraudulent.

The appellee filed a supplemental petition in which he excepted to the special defenses hereinbefore mentioned, and further pleaded that if the matters charged in the answer were true the appellant, after full knowledge of the same, had retained the appellee in its service and had thereby condoned the fraudulent representations and his want of capacity, as well as his other acts of misconduct. To this the appellant replied by a supplemental answer in which it alleged that it did not learn that any of the said representations of the appellee were false or fraudulent until after the contract of employment was made, and that immediately upon obtaining that information it began an investigation which was pursued with reasonable diligence, and that immediately upon learning that said representations were false and fraudulent it terminated the contract and discharged the appellee.

After a trial before a jury a verdict was returned in favor of the appellee for $3,000, from the judgment thereon this appeal is prosecuted.

The material facts which do not appear as being disputed show that the appellant is a private corporation engaged in the business of manufacturing and selling plows and other farming implements, with its place of business and principal office at Longview, Texas. Some time prior to February, 1907, G. A. Kelly, the president of the company, who had been actively engaged in the management of its affairs, desired to retire and turned over the business almost entirely to R. M. Kelly, his son, who was at the time secretary and treasurer. R. M. Kelly contemplated enlarging the capacity of the plant and also of extending the business of the company by employing additional traveling salesmen, and desired to employ a suitable man to take the position of sales manager of the company's

business. The duties of the sales manager were to take charge of and manage the sales department, to employ and discharge the traveling salesmen, direct their movements and assign them to territory, fix the prices upon the manufactured products and direct prices in territory where there was competition, and pass upon the responsibility of purchasers. R. M. Kelly had known the appellee for about ten years prior to the time when they began their negotiations which resulted in the contract referred to in the pleadings. These were commenced by a letter from Kelly to London asking him to call at the office of appellant on his first visit to Longview. London was at that time employed by the Parlin & Orendorff Implement Company as one of its traveling salesmen, with headquarters at Dallas. On February 18, 1907, London called upon Kelly as requested, when the latter explained the intentions of his company as to enlarging its business, and expressed a desire to employ London to take charge of the sales department. After several meetings, in a conversation concerning the details, of which there is some conflict in the testimony, a written contract was entered into by which London was employed by the appellant as sales manager for five years, at a salary of $333.33 per month, payable monthly. The contract was embodied in the following letter:

"Longview, Texas, July 1, 1907.

"Mr. Robert W. London, Dallas, Texas.

"Dear Sir: You are engaged by this company as sales manager. Your employment is to begin from this date, and is for a period of five years. Your salary is to be three hundred thirty-three and 33-100 ($333.33) dollars per month, payable monthly, until the termination of the period of five years above mentioned, and in addition we will pay your hotel, railroad, bus and livery expenses while you are away from your home in Dallas, Texas.

"You are to consult with us freely as to the policy respecting the management of the sales department from time to time, as we may request you, and when a policy has been adopted you are then required to see that said policy is carried out to the best of your ability.

"You are to suggest to us from time to time what in your judgment is needed to assist you in the management of your department, and if it is consistent we will provide same for you.

"You are to have the control of all the traveling salesmen and are to direct their movements. Revision of the salary above mentioned may be had at the end of any one of the five years above mentioned, without prejudice to the above amount, if mutually agreed to by you and ourselves at the time. If the above is satisfactory to you, please indicate by your signature below, and this shall constitute your contract of engagement.

"Yours respectfully,

"(Signed) THE G. A. KELLY PLOW COMPANY,

"By R. M. Kelly, Secretary and Treasurer.

"The above is satisfactory.

"(Signed) Robert W. London."

There are some other facts connected with the execution of this contract about which the witnesses differed and which will be referred to later. After the execution of this contract London entered upon the duties of his position and continued therein till August 6, 1907, at which time he claimed that he was injured in a wreck on a Texas & Pacific Railway train while going from Dallas to Longview. From that time until October 4 he did not perform any services for the appellant. On the latter date he made a settlement with the railway company, in which he was paid $4,100 compensation for injuries which he claimed had been received in the wreck referred to. He then returned to work for the appellant, and continued in its service till he was discharged April 4, 1908.

The two principal witnesses concerning the making of the contract were R. M. Kelly and the appellee. There is much conflict between them as to the details of the conversations which they had at different times before the making of the contract. The effect of the testimony of Kelly was that at the first meeting between him and London before making the contract, the latter represented to him that he was then getting $250 per month from the Parlin & Orendorff Implement Company, but would accept the position offered for $300 per month. Witness further stated that he afterwards met London in Dallas, and was there told by him that Mr. Robinson, the local manager for the Parlin & Orendorff Implement Company, "was all broken up and torn to pieces" about his (London's) leaving; that London told him that Robinson had told him (London) that he would meet any price that the Kelly Plow Company could afford to pay him; that if it offered him $3600 he would meet that; if it offered him $4000 he would meet that, and if that was not satisfactory he (London) could go to the bookkeeper and tell him what would be satisfactory and that it would be all right with him (Robinson). Kelly says this led him to believe that London was an exceedingly valuable man in that line of business and that Robinson had implicit confidence in him; that he had formed a very high opinion of London, and believed every thing the latter told him. He further testified that London took him to the office of the Parlin & Orendorff Implement Company, but Robinson was not there; that during this conversation London stated to him (Kelly) that when he went back to the Parlin & Orendorff Implement Company's service from the Studebaker Company he received a telegram from W. H. Parlin, of Canton, Ohio, the president of the implement company, congratulating him on returning to the service of the company, and that the telegram closed as follows: "I hope nothing will allow you to leave our service again;" that London said that on that morning Mr. Robinson had called his attention to that telegram. Kelly states that he expected to talk to Robinson about London, but did not have an opportunity of doing so. He also says that he gave London to understand that the position he was to fill was a confidential one; that London came to Longview on the 2d of July, and they entered into the contract as of July 1. Some three or four days before that Mrs. London called him over the 'phone and told him that if he would pay her husband $4000 per year they would come to Long-

view; and he told her in reply that he could not pay more than $3600. Kelly further testified that on August 6, 1907, London claimed that he received injuries in a wreck on the Texas & Pacific Railway; that he saw him examined, but could not see anything wrong. He then began to make an investigation about the matter and also about the salary, but was handicapped in so doing because London lived in Dallas and the headquarters of the railway company were at that place as well as the headquarters of the implement company; that he was busily engaged with his own affairs at Longview. He went to Dallas in October, some time during the Fair, and called to see Mr. Robinson, of the Parlin & Orendorff Implement Company; asked Robinson what salary London was getting at the time he employed him prior to that time, and was told that it was $200 per month. He had been in Dallas before, but Robinson was not in and he did not see him. He did not say anything to London about this matter, because he had his suspicions about the injuries he claimed to have sustained in the wreck and wanted to confirm those suspicions or have them cleared up. That at the time London was laying off on account of his injuries was the very time when the trade of the Kelly Plow Company should have been looked after very closely, and his services were very much needed. He says that when London returned to work he never told him he had settled his claim with the railway, or intimated that he had any claim against the railway company; that when he reported for work he looked as well as ever—he could not see any difference in him. Witness said he continued to investigate as best he could as to whether London was injured or not when he was laid off, but was very busy and could not devote much time to it. It was late in the winter before he found out that London even had a claim with the railway company at all, although he had made some inquiries before that. Witness also testified that just as soon as he got all the information he could concerning the railway matter he told London what he had heard in regard to his salary, but did not mention the railway occurrence because at that time he did not have evidence at hand and would not bring up anything he could not prove. He mentioned this matter to London on March 6, 1908. This, he says, was the first time he saw London after making investigation in the railway matter. When he confronted London with that evidence the latter said he was mistaken; he did not deny telling Kelly that he was getting $250 per month, but began to explain that Mr. Robinson's books would show that he was getting $200 per month, but that he had a side agreement with Mr. Robinson by which he was to receive $600 in addition thereto.

The effect of the further testimony of this witness is that London agreed to return to Dallas and see Mr. Robinson and have the matter cleared up; that after London reached Dallas Kelly received a letter from him in which London stated that after thinking the matter over he had decided that there was absolutely nothing to be done or considered, and that he would simply "pass the matter up;" that upon London's refusal to make any attempt to straighten the matter with reference to the discrepancies regarding his salary, he dis-

charged him. This testimony was in many respects denied by London. He stated that he told Kelly that his salary with the Parlin & Orendorff Implement Company was $3000 per year; that his salary was $200 per month, with the condition that he should receive $600 additional if he remained in the service for one year. W. M. Robinson, the manager of the Parlin & Orendorff Implement Company, testified that London was in the employ of the Parlin & Orendorff Implement Company at a salary of $200 per month; his contract was to work by the year at a salary of $2400 per year, to be paid monthly at $200 per month, and that he was not to receive any additional compensation; that some time about March or April, 1907, London told him that the Kelly Plow Company had offered him a salary of $3600 per annum, and he told the appellee that it was a larger amount than he could afford to pay, and that if he could make the arrangement he (Robinson) was not disposed to stand in his way, and advised him to accept the position. He offered appellee $50 per month additional, which would make $250 per month, if he would sell $200,000 worth of goods per annum.

As to the fraud which it is alleged the appellee perpetrated upon the railway company in procuring a settlement by which he was paid $4,100 as compensation for injuries claimed, appellant offered testimony tending to show that the shock to the coach in which the appellee was at the time riding was so slight that no injury could have resulted; that an observation of the physical condition of the appellee after the wreck failed to disclose any evidences of the injuries he claimed. There was also testimony of doctors who had made an examination of London, to the effect that if he was injured at all it was only in a slight degree. Considered in its entirety, the evidence offered by appellant upon this phase of the defense tended to show that London's injuries were simulated, and that he had by dishonorable means, false statements and misrepresentations perpetrated a fraud upon the railway company for the purpose of obtaining money. As opposed to this there was testimony on the part of the appellee tending to show that his injuries were real, and that he had made no false representations to the company and had not been guilty of any of the misconduct charged.

Upon a trial before a jury a verdict was rendered in favor of the appellee for the sum of $3000.

Appellant's first assignment of error complains of the following special charge given at the request of the appellee: "Although you may find and believe from the evidence that, pending the negotiations between plaintiff and defendant concerning the hire of plaintiff's services that ended in the contract sued on, the plaintiff represented to R. M. Kelly, Tr. and Sec. of defendant, that he was at the time receiving $250 per month from the Parlin & Orendorff Implement Company, for whom he was at that time working, and that said company had offered him $300 per month to remain, and the said Kelly was influenced by said representations to make the contract sued on, and although you should further find that plaintiff, by any false and fraudulent representation, imposed upon the Texas & Pacific Ry. Co. and its representatives and secured from them a

settlement of his damages greatly in excess of any demand which he had the right to make, yet if you further find that defendant, with knowledge of both these facts, after obtaining said knowledge, permitted the plaintiff to remain in its service and perform for it the duties which he undertook to do and perform, after knowledge of said facts came to it, then said defendant thereby condoned the faults in making said statements and waived any right it had to discharge him on account of making same." The court had previously in his general charge submitted to the jury the issue of condonation by retention in the service after knowledge of the misconduct. The effect of this special instruction was to relieve the jury from the consideration of that issue further than to ascertain whether or not there was in fact such a retention in the service. If this was found to be true there was nothing left for them to do but return a verdict in favor of the appellee. In all cases where misconduct, or acts amounting to a breach of the contract, is made the grounds for the discharge of an employe, and condonation or waiver is relied upon to meet that defense, the issue is one of fact to be decided by the jury, except in those instances where the evidence is of such a character as would warrant the court in assuming its sufficiency or insufficiency as a matter of law. Gray v. Shepperd, 41 N. E., 500; Moynahan v. Interstate Milling Co., 72 Pac., 81; Wood on Master and Servant, sec. 123.

Under the facts of this case it was for the jury to say: (1) Whether the charges of misrepresentation and fraud urged in the defense were true; (2) if true, then whether they were of such character or so inconsistent with the relations of the contracting parties, as justified the discharge of London; and (3), if these issues be decided in favor of the appellant, then whether by his subsequent conduct the appellant had not waived its objection to the misconduct and thereby lost its right to rescind the contract on that account. Upon the trial the appellee presented exceptions to those portions of the appellant's answer setting up the acts of misrepresentation and fraud relied on as a defense, all of which were by the court overruled. Numerous cross-assignments complaining of that ruling are now before us and should be considered in this connection. Counsel for the appellee insist, in opposing the materiality of the error, if any, embodied in this special charge, that the facts alleged and shown by the evidence offered by the appellant, even if true, constituted no defense to this action; that it was neither alleged nor proven that the fraud and misconduct in any way affected the business of the appellant, or that his business in any way suffered any injury therefrom. From this it is argued that the fraud, misconduct and false representations charged against the appellee were wholly immaterial, and that the exceptions urged against that portion of the answer should have been sustained. If this contention is correct there was no reversible error in giving the charge here complained of.

We are not prepared to concur in the views urged by the counsel for the appellee upon this proposition. The uncontroverted evidence shows that by the terms of his contract with the appellant London

was to take charge of the sales department of the business of the G. A. Kelly Plow Company; that he assumed supervision of all the traveling salesmen employed, had the right to fix prices of the product placed upon the market, and to make special prices in competitive territory; passed upon the contracts of sale when made, and was vested with such full authority and discretion as might make him the representative of his employer in that department of the service. This necessarily placed him in a position of trust and confidence and one of much importance to the appellant. The jury might very properly have inferred that such employment would carry with it implicit reliance by the principal, not only upon the competency of the agent, but upon his honesty and integrity as well. They might have concluded that this reliance was one of the essentials without which the functions assumed by the agent could not be adequately and satisfactorily performed.

If the foregoing conclusions be correct, then it follows that an important inquiry in determining the materiality of the facts pleaded must be as to whether the falsehoods and misconduct alleged disclose a moral depravity in the agent, London, inconsistent with the position he occupied. The argument of the appellee proceeds upon the theory that the materiality of the misrepresentations and fraud charged must be tested by their immediate effect upon, and relation to, the subject matter of the contract, the business of the appellant. We are unable to appreciate the force of that argument as applied to the facts of this case. Here the question is, has the agent shown himself unworthy of the confidence and trust which his position implies should be reposed in him, and not as to whether he has been guilty of any breach of his contract, or has adopted a course of conduct that will injuriously affect the business of his principal in the future. If the different acts of deception, misrepresentation and fraud charged in the answer of the appellant be true, then we can not say that a jury would not be justified in concluding that they were inconsistent with the relations London sustained by his contract.

Everyone who seeks and obtains employment in positions of trust and confidence impliedly warrants that he is an honest man, and the employer has the right to expect the possession of that personal integrity that will not lead to disappointment if he relies implicitly upon the honor and fidelity of his employe. When the principal discovers that his agent, or the master his servant, is lacking in those moral qualities that he had a right to expect and rely upon in making the particular contract; in other words, ascertains that his employe is not an honest man and can not be trusted, why should he not have the right to discharge? If he may discharge for incompetency, either physical or mental, why should he not have the same right when moral unfitness is shown, where moral qualifications form an important consideration in making the contract? We see no good reason why an employer should not be permitted to rid himself of a dishonest and corrupt employe, upon a discovery of that fact, without waiting till he has himself been victimized by such corruption and dishonesty. He would have the right to assume

that a man who would deliberately make a false statement about one matter would be equally perfidious about another; that a man who would wilfully and knowingly perpetrate a fraud upon one party for the sole purpose of obtaining money would, when to his interest to do so, defraud his employer also. Hence, the materiality of the facts pleaded in this case must be tested by their effect upon the appellee, as tending to show a degree of moral depravity inconsistent with the position he held in the service of the appellant. It was for that reason unimportant that the false statements and misconduct alleged related to matters in no way connected with the subject matter of the contract, or did not amount to a breach of duty toward the employer. No agent occupying a position of trust and confidence can say that his principal had no right to assume that he was honest and truthful, or that his lack of personal integrity furnished no just grounds for a discharge. He might contest the fact of his dishonesty or want of integrity, but not its legitimate consequences toward his character. To illustrate the view we take, let us suppose one employs as his agent a person with whom he has had no previous acquaintance to fill an important position, one necessarily involving the repose of trust and confidence in the personal honesty and integrity of the agent. Some time afterward the principal is made aware of the fact that his agent is a noted criminal, or that at or about the time of his employment the agent had been guilty of such deception and fraudulent conduct as stamped him at once as a dishonest and untrustworthy employe. Would it be seriously contended that the right of discharge could be exercised by the principal only when it became apparent that his own business was injuriously affected by having such an employe in his service? Would not common justice accord him the right to terminate the contract solely upon the ground that he might justly apprehend that he would in all probability be made the object of his agent's cupidity and fraud? Could the agent complain when he had not disclosed his past record, because the principal then sought to relieve himself from a relation which he would not have made had he known the true facts? No man is compelled to be dishonest, or to be guilty of fraudulent conduct; neither should any other be compelled to continue such a person in a position of trust, simply because he took him for a man of integrity and gave him employment. It is no answer to say that an employer should first acquaint himself with the character of his agent. It would ill become any man to say that another should not have trusted him.

So far as our research has extended, we have found no adjudicated cases sufficiently resembling this in the facts to be considered pointed authority upon the propositions discussed. But we believe the views expressed are in accord with established legal principles. The court below did not err in refusing to sustain the exceptions to that portion of the appellant's answer pleading the facts we have referred to. Wood on Master and Servant, sec. 110; Mechem on Agency, secs. 214, 215.

The court had no right, under the facts of this case, to assume as a matter of law that the mere retention of the appellee in the service

of the appellant, after its officers had acquired a knowledge of the alleged misconduct, operated as a condonation of the offense and took away the right of discharge on that account. There is nothing in the evidence adduced upon the trial that would justify taking that issue from the jury in the manner done by the special charge complained of. In fact, we are not prepared to say that a plea of condonation can be made applicable to a case such as this is shown to be. Condonation gathers its most essential elements from the principles of equitable estoppel. We can now call to mind no instance in which that plea has been appropriately urged where the facts failed to show that it would be inequitable and unfair to the employe to justify the discharge upon the ground of former misconduct. If the right to discharge for lack of honesty and personal integrity in the employe ever once arises it is difficult to conceive of a situation where it would be forfeited merely because there had been an indulgence by his employer. It is doubtless true that where an employe who has in the past been guilty of conduct which tends to reflect upon his honor and personal integrity, or has committed offenses involving moral turpitude, discloses those facts at the time of his engagement and is employed with full knowledge of their existence, such offense could not thereafter serve as sufficient excuse for his discharge. It may also be true that where the misconduct occurs after employment, and the employe confesses his dereliction and upon a promise of reformation is retained in the service, his employer would be equally estopped by such retention unless other offenses, reasonably justifying the belief that the promise of reform had not been kept, should subsequently occur. But such instances are quite different from those where the employe contests the right of discharge upon the ground that the accusations against him are false, or if true, are legally insufficient. In applying the principle of condonation we must distinguish between that class of cases where the misconduct in issue is merely a breach of duty due from the employe to his employer, or where it is of such a character as may injuriously affect the master's business, and that other class in which the conduct is complained of as revealing a character for moral depravity inconsistent with the position occupied. In the first instance, by a continuation of the service after knowledge by the master the servant might justly assume that his dereliction had been overlooked, and be fairly induced to rely upon the continued observance of the original contract and adjust his situation accordingly. Such instances probably fall within the rule requiring one to whom the right of enforcing a forfeiture has accrued to use reasonable diligence in its exercise, or it will be considered as waived. In the second class the misconduct in question is not to be regarded as ipso facto forfeiting the right of the employe to insist upon a continuation of the contract, or as of itself conferring the right, but only as evidence of the moral unfitness of the employe. The right of discharge, if any, must rest upon the legitimate inferences to be drawn from that conduct, upon the particular character which it reveals, and not upon the mere occurrence of misconduct itself. If it is sufficient to disclose the lack of honesty and personal integrity

in the employe inconsistent with the position which his contract has given him, this may be looked upon as a continuing condition, not ceasing with the happening of the particular conduct from which it has been inferred. Hence, it could hardly be said that the question of condonation of the particular misconduct here relied upon was in issue; because the most important details of it did not affect the appellant in any way. To say that appellant condoned those acts would be simply to say that it condoned the evidences of the main fact upon which its defense is based. Dishonesty of character is as much a continuing condition as incompetency, and probably more so, yet it has been held that the right to discharge for incompetency is not lost by a continuation in the service after its discovery. United Oil Co. v. Grey, 47 Texas Civ. App., 10, 102 S. W., 934; Glasgow v. Hood, 57 S. W., 162.

On the measure of damages the court gave the following charge: "You are further instructed that if you find that plaintiff was wrongfully discharged as explained, the measure of his damages would be the difference between the sum which defendant was to have paid him under the written agreement sued on in this case, if you find it made such agreement, and the sum he would earn under the contract which he alleges he made with the Parlin & Orendorff Implement Co. after his alleged discharge from the defendant's service." It is admitted that the amount actually found by the jury in this trial would make the error embraced in this charge immaterial if the judgment should not for other reasons be reversed. In view of the fact that the case must be tried again, it becomes our duty to consider this assignment. The testimony shows that London was discharged by the appellant on April 4, 1908, and that on the 15th day of the same month he entered into a five year contract with the Parlin & Orendorff Implement Company by which he was to receive $1350 for the remainder of the year 1908, and $200 per month thereafter, payable monthly. It also appears from the terms of the contract with the appellant that it would not expire till June 30, 1912, more than two years from this time. The charge of the court assumed as a matter of law that the difference between the amounts to be paid under the two contracts till June 30, 1912, was the correct measure of appellee's damages. We think this was error. Actions of this class are not suits to recover unpaid wages, but for damages, and compensation for the injury sustained is the object sought. Lichenstein v. Brooks, 75 Texas, 196, 12 S. W., 975; 3 Sutherland on Damages, sec. 692. The rule for ascertaining the amount which should be awarded to an employe who has been discharged in violation of his contract is usually stated to be the difference between what he would have received under the broken contract had it been continued, and that which he may by the exercise of ordinary diligence receive in some other employment. This rule does not necessarily imply that when the employe after his discharge has made a second contract, even though it may be one of which the opposite party could not complain, the difference in the value of the two fixes, as a matter of law, the amount of damages. In passing upon the question of damages the jury should be left free

to take into consideration the character of the two contracts, the situation and condition of all the parties, the probability, or improbability, of the discharged employe being able to carry out his first undertaking, the vicissitudes and uncertainties attending life, and the likelihood of a promotion before the end of the term of the broken contract. Where the case is tried before all of the wages under the original contract become due, the jury should likewise be permitted to consider the value of present payment. From all these they should award such damages as the employe shows he has actually sustained by reason of his wrongful discharge. The charge of the court required the jury to award to the appellee the full amount he would have received under his contract with the appellant, less what he is to get under his present contract with the Parlin & Orendorff Implement Company, notwithstanding all of his wages under appellant's contract would not have become due till more than two years from the date of the trial. Upon another trial this should be corrected.

Special charge No. 6 given at the request of the appellee was on the weight of the evidence and should have been refused. The appellant offered to prove by the witness W. D. Young certain facts relating to the extent of the jar of the train caused by the wreck in which the appellee claimed that he was injured. Young testified that he was sitting by the side of London at the time. Had he been permitted he would have testified that the jar was such that he felt it, but it had no effect on him and did not in any way injure him, and never moved him from his position in the seat; also that at the same time the Pullman conductor and two ladies were standing up in the end of the car, and that neither the derailment, the running of part of the train off the track, nor the stopping of the train threw them, or any of them, off their feet. One of the ladies was standing in the aisle of the Pullman car with a baby in her arms, and it did not throw her any distance; she made only one or two steps and remained standing. This testimony was excluded upon the objection that it was immaterial. We think this was error. If it became proper and pertinent to inquire into the truth of the representations made by London concerning his injuries, it then became material to consider all the circumstances attending the occurrence of the wreck, and other surroundings, to enable the jury to ascertain whether or not he had in fact been injured. Testimony tending to show the extent of the jar, or jolt, by which London claimed he was injured, was material and important as bearing upon the question as to whether or not he had in fact received any injuries at that time; and for that reason we think the testimony should have been admitted.

Appellant's seventh assignment of error and appellee's twenty-second and thirtieth cross-assignments appear to be in conflict. One complains of the rejection of certain testimony offered by appellant, and the other objects to its admission. The appellant's bill of exceptions shows that the testimony was rejected, while that of the appellee shows that it was admitted over his objection. The testimony referred to is that of R. M. Kelly, and is as follows: "When Lon-

don came down on the 2d of July he brought two contracts that he had drawn up himself, both of them in duplicate, exactly alike except that one had $300 a month as the salary, and the other $333.33 per month; and he handed both of them to me and stated that it mattered little to him personally which one he signed, but that his wife did not want to leave Dallas and did not want to make Longview her home, and if I would sign the one for $333.33 it would please her and satisfy her, and at the end of the year he would return $400 of the $4000; and I signed it, considered that we were only paying him $3600 a year." We find this testimony in the statement of facts as having been given by Kelly, and assume that it was admitted. The objection is that it tended to vary the written contract pleaded and relied upon by the appellee. As against this objection we think the evidence was properly admitted. The effect of the testimony did not necessarily contradict or vary the written contract referred to in which London was to receive $333.33 per month in monthly installments, but was to show that the writing did not embrace all of the terms of the agreement made by the parties at the time; that there was a provision of that contract calling for a return of a portion of the salary at the end of each year. This, we think, brings this testimony within the rule applicable where a part only of an agreement between the parties is reduced to writing, and permits parol evidence to show the remainder. Thomas v. Hammond, 47 Texas, 51; Quigley v. Shed, 58 S. W., 266; 9 Ency. of Evidence, 350, and cases cited.

Portions of letters written by appellee to the appellant and admitted over objection are complained of in assignments Nos. 9 and 10. These portions of those letters could have served no useful purpose, and should have been excluded. It does not appear that they could contribute anything to a proper understanding of the extracts previously offered by the appellant. We think, however, that their introduction was of such small consequence that we should not feel inclined to reverse the judgment on that account.

We sustain cross-assignments Nos. 17 and 21. All of the remaining assignments and cross-assignments which have not been discussed are overruled.

The judgment of the District Court is reversed and the cause remanded.

Reversed and remanded.

SUZIE S. DUPERIER v. DOUGLAS DUPERIER.

Decided February 11, 1910.

1.—Husband and Wife—Deed by Husband to Wife—Effect.

A deed by a husband to a wife of community property vests the title thereto in her separate estate, and this, although there be no recitals in the conveyance evidencing such intention on the part of the husband.

2.—Same—Conveyance by Third Party.

When a third party conveys to the wife by a deed which does not in terms

convey to her separate use, nor show that the consideration was paid out of her separate estate, the title so conveyed vests prima facie in the community. Such prima facie effect may be avoided by proof that the consideration was paid out of the wife's separate estate, or that it was the intention of the grantor that the property should belong to the separate estate of the wife.

3.—Same—Conveyance to Wife in Trust.

A husband and wife conveyed a town lot, the husband's separate property, to a third party with the understanding that said party would convey the said property to the wife so as apparently to vest the title in her separate estate; this was done to prevent the husband's creditors from levying on the property, and not for the purpose of making the property the wife's separate property in fact; the deed from the third party to the wife by mistake failed to use such apt words as would make the property the wife's separate property. The husband and wife separated, and the wife sued to divest the title to the lot out of the husband and out of the community estate and vest the same in her separate estate. Held, the intentions of the parties should control; and because it was never the intention of the husband or the wife that by said transaction the property was to become in fact her separate property, she was not entitled to recover.

4.—Fraudulent Conveyance—Exempt Property.

A conveyance of property which is in fact exempt as homestead is not a conveyance in fraud of creditors, although the conveyance was made under the mistaken belief that creditors might seize it. Property so conveyed might be recovered by the grantor.

Appeal from the District Court of Jefferson County. Tried below before Hon. L. B. Hightower.

G. P. Dougherty, for appellant.—Where land is conveyed to a married woman by a third party by a deed which in form makes the property conveyed community, it can be shown by parol evidence that the conveyance was made at the request and under the direction of the husband; and all the facts and circumstances surrounding the execution of the deed may be shown by parol in order to determine the intention of the parties to the transaction; and if it was the intention that the property should be conveyed to and held by the wife as her separate estate, the conveyance will be sustained so as to make the property separate estate of the wife. Higgins v. Johnson, 20 Texas, 389; Cook v. Bremond, 27 Texas, 457; Wallace v. Campbell, 54 Texas, 87.

Where a husband conveys land, whether his separate property or community, directly to his wife, the effect of the conveyance, as between the parties to it, is to vest the title in the wife as her separate estate, without reference to the form of the conveyance, and this rule applies to a conveyance of property by a husband through a trustee to his wife. Story v. Marshall, 24 Texas, 306; Lewis v. Simon, 72 Texas, 470; Callahan v. Houston, 78 Texas, 494; Swearingen v. Reed, 2 Texas Civ. App., 364; Kahn v. Kahn, 94 Texas, 114; Hunter v. Hunter, 45 S. W., 820; Jones v. Humphreys, 39 Texas Civ. App., 644; Peters v. Clements, 46 Texas, 125.

The legal effect of a deed to land by a husband to his wife, without recitals as to the consideration paid or purpose of the conveyance, is to vest the title to the property in the wife as her separate

estate, and the estate conveyed by such a deed can not be destroyed by the parol evidence of the grantor that he did not intend to pass the title to the property to the grantee, in the absence of proof of fraud, accident or mistake. Lott v. Kaiser, 61 Texas, 665; Newman v. Newman, 86 S. W., 635; Callaghan v. Houston, 78 Texas, 494; Kahn v. Kahn, 94 Texas, 114.

In order to engraft an express trust upon a deed absolute upon its face, the proof must be clear, satisfactory and of such character as to place the existence of such a trust beyond a reasonable doubt. Miller v. Thacher, 9 Texas, 482; Hodges v. Johnson, 15 Texas, 571; Hall v. Layton, 16 Texas, 262; Grooms v. Rust, 27 Texas, 234; Pierce v. Fort, 60 Texas, 471; Ingenhuett v. Hunt, 15 Texas Civ. App., 248; Hunter v. Hunter, 45 S. W., 820; Whitfield v. Diffie, 105 S. W., 325.

Where a grantor conveys or directs a conveyance by a third party, of his separate estate to his wife or child, the presumption is that the property is conveyed as a gift or advancement and no trust is implied or results from such a transaction in the absence of an express agreement to this effect: and in order to show that such a grantee holds the title as an express trustee, it must be shown that there was an express agreement between the parties whereby the grantee agreed to hold the title in trust for the grantor. Perry on Trusts, sec. 143; Higgins v. Johnson, 20 Texas, 389; Lott v. Kaiser, 61 Texas, 665; Kahn v. Kahn, 94 Texas, 114.

Where a grantor conveys property entirely without consideration, in fraud of creditors, the conveyance between the parties to the same is valid and binding, and the grantee holds the superior title as against the grantor, and this is true whether the property at the time of the conveyance was subject to forced sale or not. Hoeser v. Kraeka, 29 Texas, 450; Eastham v. Roundtree, 56 Texas, 110; Biering v. Flett, 7 S. W., 229; Dittman v. Wiess, 87 Texas, 614.

E. E. Easterling and *J. D. Martin,* for appellee.

PLEASANTS, CHIEF JUSTICE.—This suit was brought by appellant against her husband, Douglas DuPerier, to recover the title and possession of lot No. 10, in block No. 73 of Van Wormer's addition to the city of Beaumont. After the usual allegations in a suit of trespass to try title, the petition further alleges:

"Plaintiff further represents to the court that the property in controversy in this suit was conveyed to the defendant by Alfred DuPerier on the 12th day of July, 1902, by general warranty deed, for the consideration of $2400 cash; that after the defendant had acquired title to the property he desired to convey the same to his wife, the plaintiff herein, to be owned and held by her as her own separate estate, and the defendant sought the advice of a lawyer as to the manner in which title to the property could be passed from him to his wife, the plaintiff herein, so that she could own and hold same in her own right as her own separate estate; and the defendant was advised by an attorney that the only valid way to effect a transfer of title to said property from the defendant to his

wife, the plaintiff herein, so that the same could be conveyed to and owned by her as her own separate estate, was to make, execute and deliver a deed conveying the property to some third party who should act as the trustee to hold said property, and after said deed had been executed and delivered to the said third party as trustee and the title had fully passed out of the defendant, that the said trustee could legally convey the property to the defendant's wife, the plaintiff herein; and, acting upon said advice and believing the same to be the correct and only valid way in which the title to said property could be passed from said defendant and vested in his wife, the plaintiff herein, so that the same could be owned and held by her as her own separate estate, the defendant and this plaintiff executed and delivered a general warranty deed conveying this property to one H. P. Barry, on the 23d day of September, 1903, which said deed is recorded on page 588 of volume 73 of the deed records of Jefferson County, Texas; that no consideration of any kind or character was paid by the said H. P. Barry for said conveyance of said property, and no consideration of any kind or character was received by plaintiff or defendant from H. P. Barry for said property, and the recitals of the payment of consideration in said deed are not true; and on the other hand, it was expressly agreed and understood by and between all the parties to said transaction, that the said H. P. Barry should hold the title to said property as a trustee, and that he should thereafter make, execute and deliver to the plaintiff herein a good and valid deed of conveyance that would convey to this plaintiff the title to said property to be owned and held by her as her own separate estate; and that in pursuance of said agreement and understanding, the said H. P. Barry and his wife Katherine M. Barry, on or about the 1st day of October, 1903, made, executed and delivered to this plaintiff a general warranty deed of conveyance to this plaintiff the property now involved in this suit, which said deed is recorded on page 328 of volume 75 of the deed records of Jefferson County, Texas. And the said H. P. Barry and his wife, Katherine Barry, received no consideration of any kind or character for said conveyance of said property, and the said deed was made in pursuance of the general agreement or understanding made and entered into by the plaintiff and defendant herein and the said H. P. Barry at the time plaintiff and defendant conveyed the said property to the said H. P. Barry by the said deed of September 23, 1903, to the effect that it was the purpose of said conveyance and the intention of all the parties to said deed that the property should be conveyed to and held by this plaintiff as her own separate estate, and the property was conveyed and title to the said property was vested in the said plaintiff herein as her separate estate, but the deed does not show upon its face, by reason of a mistake of the draughtsman who draughted said instrument, that the property is conveyed to and to be held by the plaintiff as her own separate estate, but in truth and in fact it was the understanding of all the parties to the conveyance that such should be the effect of the said conveyance, and the property was conveyed by plaintiff and defendant to said H. P. Barry for the sole purpose of having it conveyed to the plaintiff

herein as her separate estate; and the said H. P. Barry, acting as said trustee, was instructed and directed by the defendant herein to convey the property to this plaintiff to be owned and held by her as her separate estate, and in truth and in fact the property was so conveyed and is now owned by and held by her as her separate property."

Then follow allegations sufficient under the rule announced in Dority v. Dority, 96 Texas, 215, to entitle plaintiff to maintain this suit against her husband. The prayer of the petition is that plaintiff have judgment for the title and possession of the property, and that defendant be restrained from collecting rents therefor and from interfering with its management and control by the plaintiff.

Defendant answered by general denial and plea of not guilty.

The trial in the court below without a jury resulted in a judgment in favor of defendant, "that plaintiff take nothing by her suit."

The evidence shows that plaintiff and defendant were married on January 12, 1901, and that the property in question was conveyed to defendant by his father, Alfred DuPerier, on January 12, 1902, by a deed which recites a cash consideration of $2400 paid by defendant. The undisputed evidence further shows that no consideration was in fact paid by the defendant for the property and it was in fact a gift from his father.

We adopt the following conclusions of fact filed by the trial judge:

"Shortly after said property was given to defendant, he and the plaintiff, who was then his wife, moved on to said premises and occupied the same and claimed the same as their homestead, and the same was in fact their homestead and remained their homestead up to the separation of plaintiff and defendant, as hereinafter mentioned.

"A little while prior to the execution of the deed by defendant and wife to H. P. Barry, hereinafter mentioned, the defendant and plaintiff had gone to the town of Erath, in the State of Louisiana, and they were temporarily residing at said place at the time of the execution of said deed to said Barry, but were then claiming the property in controversy as their homestead, and in fact intended at that time to return to said property and occupy the same as their homestead.

"At said time the defendant was indebted to divers persons, the exact amount of which indebtedness I do not know, but the same was somewhere between five hundred and a thousand dollars.

"I find that while plaintiff and defendant were so residing in the State of Louisiana, defendant's father, who lived in Louisiana, and who knew of defendant's indebtedness, became apprehensive that the property in controversy would be levied upon by some creditor, and that defendant would run the risk of having same subjected to forced sale, and that defendant's father for this reason frequently counseled with plaintiff and defendant and advised them both to make such disposition with reference to said property as would keep the same from being subjected, or attempted to be subjected, to sale for defendant's debts; and I find that defendant at first refused to abide by any suggestion made by his father, defendant claiming that the property was his homestead and not subject to execution; but

defendant finally, both because of the insistence of his father and the importuning of plaintiff, his wife, agreed that the property in controversy should be conveyed by himself and wife to one H. P. Barry, of Beaumont, Texas; that it was understood between defendant and his wife, the plaintiff, at the time of the execution of the deed by himself and plaintiff to Barry, that Barry should hold the said property in trust, and reconvey the same to the plaintiff, Suze S. DuPerier; that the purpose actuating plaintiff and defendant was to keep creditors of defendant from attempting to subject said property to sale for defendant's debts, both of them believing that if the property should stand in the name of plaintiff, creditors would not be apt to attempt its subjection to execution; and this arrangement was agreed upon by plaintiff and defendant in order that they might not be harassed by attempts to subject said property to execution.

"That plaintiff and defendant did in fact convey said property to H. P. Barry by deed dated September 23, 1903, and that no consideration then passed or was intended to pass between said parties for said property, and that such conveyance was for the purpose as stated in the paragraph above.

"That H. P. Barry conveyed the property in controversy to plaintiff by deed on or about the 1st of October, 1903, and that no consideration of any kind was paid by plaintiff for said property conveyed by said deed.

"That the deed from plaintiff and defendant to H. P. Barry and the deed back from H. P. Barry to the plaintiff, were executed and delivered under and by virtue of a previous agreement and understanding between plaintiff and defendant to the effect that the property should be conveyed by plaintiff and defendant to the said Barry and that the said Barry was to hold the same in trust and thereafter to convey the same to the plaintiff herein; and that it was the intention of plaintiff and defendant that the said Barry in making such conveyance to the plaintiff should make the deed sufficient upon its face to convey the property to the plaintiff as her separate estate; that is to say, that the said Barry should use such apt words as would be sufficient to make said deed in form a conveyance to the plaintiff for her sole and separate use; and that it was a mistake on the part of said Barry in making said deed to plaintiff in not using apt words as would made said deed upon its face a conveyance to the sole and separate use of plaintiff, and that said Barry fully intended that said deed should be in form sufficient to make the same a conveyance to the sole and separate use of the plaintiff.

"That the understanding with the said Barry with reference as to how his said deed to the plaintiff should read, was had solely with plaintiff, and that the said Barry was never consulted by defendant about such transaction; but the plaintiff, in having such understanding with said Barry, was acting with the consent of defendant and in accordance with the previous agreement between plaintiff and defendant.

"That it was never the intention of the defendant to give said property to the plaintiff by reason of his agreement to have the said Barry deed to show it upon its face, and that the plaintiff knew and

understood that she was not to have said property as her own separate estate, nor did she at that time intend to take advantage of said Barry deed and claim said property as her own, but was merely acting with defendant with a view to preventing creditors of defendant from levying execution on said property, and that both plaintiff and defendant recognized the fact and understood that said property was to be and remain the separate property of the defendant, notwithstanding the recitals, or intended recitals, of the deed to plaintiff from the said Barry.

"That plaintiff and defendant are permanently separated, and that there is no reasonable probability of their ever living together as husband and wife again; that the plaintiff abandoned the defendant while they were temporarily residing in the State of Louisiana, and returned to her stepfather's home in the State of Michigan, where she has continued to live to the date of this cause; but that plaintiff was warranted in abandoning defendant on account of his treatment of her, and that such treatment would be just grounds in this State for a divorce, should the plaintiff apply for same.

"That the defendant has collected the rents upon the property in controversy during the entire time that plaintiff and defendant have been away from said property, and that the defendant has appropriated the amount so collected to his own use and benefit."

Under appropriate assignments of error the appellant assails the judgment of the court below upon the following grounds:

First: Because the court having found that it was the intention of appellee that the deed from Barry to appellant should on its face pass the title of the property to appellant in her separate right, the deed should be considered as containing apt words expressing such intention, and when so considered appellee will not be heard to say that it was not his intention that the title to the property should vest in appellant in her separate right.

Second: Because the evidence is insufficient to support the finding that it was the intention of the appellee and the appellant that she should hold the title in her separate estate in trust for the benefit of appellee.

Third: Because it having been the intention of appellee that the deed should convey the property to appellant as her separate estate, and the evidence showing that such conveyance was for the purpose of defrauding appellee's creditors, he can not recover from appellant the property so intended to be conveyed to her in fraud of his creditors.

We will consider these objections to the judgment in the order in which they are presented.

The deed from Barry to Mrs. DuPerier does not convey the property to her in her separate right, and on the face of the conveyance the title is in the community estate. If the conveyance had been made directly from the husband to the wife, the title would *prima facie* have vested in her separate estate without any recitals in the conveyance evidencing such intention on the part of the grantor. The apparent title having been in the community under a deed to appellee executed subsequent to his marriage and which recites a

valuable consideration, his conveyance to his wife would have put the title in her separate estate in the absence of evidence showing a contrary intention. In these circumstances any other construction of the deed would render it wholly inoperative, or, as said by Judge Gaines in the case of Lewis v. Simon, 72 Texas, 470: "Would be equivalent to holding that it passed the title from the community to the community; or, in other words, that it passed nothing." Storey v. Marshall, 24 Texas, 306; Swearengen v. Reed, 2 Texas Civ. App., 364 (21 S. W., 383); Hunter v. Hunter, 45 S. W., 820; Kahn v. Kahn, 94 Texas, 114.

This construction can not, however, be placed upon the deed from Barry to appellant. When a third party conveys to the wife by a deed which does not in terms convey to her separate use, nor show that the consideration was paid out of her separate estate, the title so conveyed vests *primâ facie* in the community. If the consideration in such case was paid out of the wife's separate estate, or if the intention of the grantor was to convey the property to the wife for her separate use and benefit, these facts could be shown, and in such case the title would vest in the separate estate of the wife.

Appellant concedes that upon the face of the record the title to the property is in the community, and that to entitle her to recover in this suit she must show that appellee intended by the conveyance to Barry and from Barry to appellant to give her the property in her separate right. The trial court finds that this was not the intention of the parties, but their intention was to have the title to the property placed in appellant merely for the purpose of preventing any attempt upon the part of appellee's creditors to subject it to the payment of his debts; and we think this intention must determine the rights of the parties in the property.

If the deed had by its terms conveyed the property to appellant in her separate right, still it might be shown that she took the title upon an express trust and held it for the benefit of appellee or for the use and benefit of the community estate; but we do not think the rights of the parties are the same as they would be had the deed conveyed the property to appellant's separate use and benefit. In such case, no express trust being shown, appellee would be estopped to claim that he did not intend to give the property to his wife. The deed to appellant does not convey the property to her separate use, and it seems to us that it would be an unreasonable extension of the doctrine of estoppel to hold that because appellee intended it should contain such recital he will not be heard to say it was not his intention to give her the property. Estoppel arises from words or acts and not from intention alone. Upon the facts found by the trial court appellant's contention is, in effect, this: "While the deed on its face gives me no title to the property and it was not the intention of my husband that I should have the property, yet because he did intend that the deed should place the apparent title in my separate estate, the property is mine." We do not think this contention is sound.

The second objection to the judgment is also untenable. The testimony was conflicting upon the question of the intention of the

parties, but the evidence is sufficient to sustain the finding that it was agreed and understood by both appellant and appellee that appellant was not to have the property, but that the title was to be placed in her for the sole purpose of preventing appellee's creditors from attempting to subject it to his debts. We think if the property had been conveyed to her separate use under this understanding she would hold it in trust for appellee's benefit.

Appellee had no intention of defrauding his creditors in making said conveyance. The property was his homestead and he had no intention of abandoning it at the time the conveyance was made. Under these facts if the title had been in fact placed in the appellant for the purpose of protecting the homestead, appellee would not be denied the right to recover the property thus held in trust for his benefit. Newman v. Newman, 86 S. W., 635; Rivera v. White, 94 Texas, 538.

We think the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

Writ of error refused.

HOUSTON ELECTRIC COMPANY v. CHARLES FAROUX.

Decided February 11, 1910.

1.—Juries—Selection—Jury Wheel Law, Constitutional.

The Act of the Thirtieth Legislature (Gen. Laws, 1907, p. 269) known as the "Jury wheel law" prescribing a method for the selection of jurors in counties which have a city or cities therein with a population of 20,000 or more according to the United States census of 1900, is not in violation of article III, sec. 56, of the Constitution, which provides that the Legislature shall not, except as otherwise provided in the Constitution, pass any local or special law authorizing the summoning or empaneling of grand or petit juries.

2.—Personal Injury—Issue of Fact—Province of Jury.

It is peculiarly the province of the jury to determine issues of fact when the evidence is conflicting. Evidence reviewed in a damage suit for personal injuries caused by the derailment of a street car, and held sufficient to support the verdict for the plaintiff although diametrically opposed to the evidence introduced by the defendant.

3.—Same—Imputation of Fraud—General Reputation.

The issue being whether plaintiff had been ruptured and injured by the derailment of a street car on which he was a passenger, or whether such injuries existed prior to the derailment and arose from other causes than the derailment, as alleged by defendant, the court properly permitted the plaintiff to introduce evidence of his general reputation for truth and veracity, honesty and fair dealing.

4.—Practice on Appeal—Objection to Evidence.

An objection to the admission of evidence not made in the trial court will not be considered on appeal.

5.—Expert Testimony—Exclusion—Harmless Error.

The issue being whether the rupture from which plaintiff suffered was caused by the derailment of a street car on which he was a passenger or had existed before that time, and a doctor having testified for defendant that plaintiff manipulated and reduced the rupture in the doctor's presence on the day following the accident; that such manipulation required skill and practice,

it was not reversible error to refuse to permit the doctor to testify further that plaintiff reduced the rupture as one familiar with such an operation.

Appeal from the District Court of Harris County. Tried below before Hon. Norman G. Kittrell.

Baker, Botts, Parker & Garwood, for appellant.—The jury-wheel law is unconstitutional and void. Article III, sec. 56 of the Constitution; Chap. 139, p. 269, Acts 1907; Binney's "Restrictions upon Local and Special Legislation in State Constitutions," pp. 54, 59, 78-80; Lewis' Sutherland on Statutory Construction, secs. 125, 127, 200; State v. Scott, 100 N. W., 812; City of Topeka v. Gillett, 4 Pac., 800-2; State v. City of Des Moines, 65 N. W., 818; Eckerson v. City of Des Moines, 115 N. W., 117; Campbell v. City of Indianapolis, 57 N. E., 920; Mitchell v. McCorkle, Sheriff, 69 Ind., 184; Town of Longview v. City of Crawfordsville, 73 N. E., 78; Board of Commissioners v. Spangler, 65 N. E., 743; Kraus v. Lehman, 83 N. E., 714; Edmunds v. Herbandson, 14 L. R. A., 725-7; Plummer v. Borsheim, 80 N. W., 690; Vermont Loan & Trust Co. v. Whithed, 49 N. W., 318-20; State v. Schwab, 34 N. E., 736; State v. Mitchell, 31 Ohio St., 592; State v. Pugh, 1 N. E., 439; State ex rel. Bennett v. Common Council of Trenton, 25 Atl., 114; Perrine v. Jersey Central Traction Co., 56 Atl., 374; State v. City of Elizabeth, 28 Atl., 51; State v. City of Passaic, 45 Atl., 817; Dickinson v. Board of Chosen Freeholders of Hudson County, 60 Atl., 220; State ex rel. Patterson v. Donovan, 20 Nev., 75; Woodard v. Brien, 14 Lea, 520; Sutton v. State, 33 L. R. A., 589; Peterson v. State, 56 S. W., 834; Nichols v. Walter, 33 N. W., 800-2; State v. Rogers, 106 N. W., 345; Devine v. Board of Commissioners of Cook County, 84 Ill., 590; Pettybone v. West Chicago Park Commissioners, 74 N. E., 398-9; Bingham v. Board of Supervisors, Milwaukee County, 106 N. W., 1071; Burnham v. City of Milwaukee, 73 N. W., 1018; Village of Bloomer v. Town of Bloomer, 107 N. W., 974; Groves v. County Court, 26 S. E., 460-3: Dunne v. Kansas City Ry. Co., 32 S. W., 642; State v. Herrmann, 75 Mo., 340; State v. Justices of County Court, 1 S. W., 307; State ex rel. Kehr v. Turner, 107 S. W., 1064; In re Henneberger, 50 N. E., 61; St. John v. Andrews Institute for Girls, 83 N. E., 981; Ladd v. Holmes, 66 Pac., 714; Ellis v. Frazier, 63 Pac., 642; Codlin v. Kohlhousen, 58 Pac., 499; Guthrie Daily Leader v. Cameron, 41 Pac., 639; Miller v. City of Louisville, 99 S. W., 284; Blackenburg v. Black, 50 Atl., 198; Lougher v. Soto, 62 Pac., 184; State v. Berkeley, 41 S. E., 961; McInerney v. City of Denver, 29 Pac. 516; Central Trust Co. v. Citizens' Street Railway Co., 80 Fed., 218-222.

In an action for damages for alleged personal injuries, general evidence of good character or reputation of plaintiff is immaterial and irrelevant, unless his reputation has first been attacked by defendant by general evidence of bad character. In this case defendant offered no evidence on the question of plaintiff's character or reputation, the issue being whether or not plaintiff had sustained the injury claimed at the time and in the manner alleged. The court therefore erred in admitting the evidence above referred to, and in permitting plaintiff

to bolster up his case with evidence of previous good character, to the prejudice of defendant's rights. Texas & P. Ry. Co. v. Raney, 86 Texas, 367; Gulf, C. & S. F. Ry. Co. v. Younger, 40 S. W., 423; Timmony v. Burns, 42 S. W., 133-4; McCowan v. Gulf, C. & S. F. Ry. Co., 73 S. W., 47; White v. Epperson, 32 Texas Civ. App., 162.

That the testimony of Dr. Scott was admissible: Seliger v. Bastian, 66 Wis., 521-2; Rogers on Expert Testimony, p. 19, sec. 6, p. 148, sec. 64.

The court erred in permitting counsel for the plaintiff to ask witness Doctor Slataper the following questions: "Isn't it a fact that, when railroad patients come into that infirmary, you have a regular printed form of questions and answers whereby you take their statements and find out how the accident occurred, and that it is the duty of the physician to take, for the benefit of the railroad company, a statement of the injured party."

Defendant objected to this question, because it had not been shown that the street railway company had any connection with the physicians or hospital in question, and because it had been shown that the defendant company had no connection with the hospital, and that the physicians were not physicians for the street railway company, it also having appeared in the evidence that the plaintiff voluntarily went to the hospital and called in these doctors to see him, and they were not called or selected by the street railway company. In response to the objection to the above question counsel for plaintiff stated:

"I wanted to show that this witness habitually did not disclose any such delicacy with reference to other patients, and I propose to show that these doctors have testified time and again to every term of the court for years and years here."

Defendant there and then objected to counsel's remarks, but the court permitted the question to be asked and the remark to go unchallenged. Thereupon, over the objection of the defendant, the following questions were asked and answers elicited:

Q. "You didn't get this notion of yours that it wasn't fair to a patient to disclose what he said in his pain and anguish, and the confidential relation to his physician—you didn't get that notion from Dr. Stuart and Dr. Red?"

A. "No, sir."

Q. "You got that somewhere else? Isn't it a fact that Dr. Stuart and Dr. Knox are called—say Dr. Stuart and Dr. Red—that they are called time and time again every year as witnesses for the railroad company against patients, without reference to the railroad company or not—called as witnesses against patients in their infirmary, not for the patients, but against them?"

A. "They have been called both ways."

Q. "What portion of the time both ways—what is the majority of cases?"

A. "With reference to strictly railroad work or private patients?"

Q. "I am talking about patients that are sent there under the circumstances mentioned awhile ago, when you take their written statements on a printed form."

A. "Where the cases that I take the statement on a written form, those are cases for which I am division surgeon for the railroad."

Q. "And you turn in that information to the railroad company?"

A. "I do on the road that I am division surgeon on; there is a lot of roads over there that I don't have anything to do with."

Q. "They are taken not for the benefit of the patient, then; that's true?"

A. "They are taken because we are asked to take those statements."

Q. "Who asks you to take them—who requests you to take them?"

A. "The chief surgeon of the railroad."

Q. "Who is the chief surgeon of the railroad?"

A. "Red and Stuart."

Hogg, Gill & Jones, for appellee.

McMEANS, ASSOCIATE JUSTICE.—Charles Faroux sued the Houston Electric Company for damages for personal injuries sustained by him by derailment of a street car of the defendant upon which he was a passenger. He alleged that when the car left the track he was violently thrown against the seats of the car and permanently and seriously injured and ruptured.

Defendant answered by general denial, and specially pleaded that, if the plaintiff is suffering from any or all of the injuries alleged by him, that he did not receive such injuries at the time and in consequence of the derailment of the car, but that the same existed anterior to the time of the accident, and arose from causes and conditions other than the derailment.

The case was tried before a jury, and resulted in a verdict and judgment for plaintiff. Defendant appeals.

Appellant's first assignment of error is as follows: "The court erred in overruling the defendant's motion to quash the panel of jurors selected for the week in which this case was tried, and from which panel the defendant herein was required to select the jury to try this case, because, as is averred in said motion, the jury was not selected by jury commissioners as provided by the Revised Statutes, but under what is known as the jury-wheel law enacted by the Thirtieth Legislature of the State of Texas, which enactment is unconstitutional and invalid."

Appellant contends that chapter 139 of the Acts of the Thirtieth Legislature, known as the "Jury-Wheel Law," is a special law, because it applies only to counties which, according to the United States census of 1900, had a city or cities therein with a population of twenty thousand or more, and which will still apply to such counties though, by a subsequent census, their cities fell short of the designated population, and does not apply to other counties thereafter having a city or cities therein with such population; and that the Act is therefore in conflict with article III, section 56 of the Constitution of Texas, which provides that: "The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing . . . summoning or empaneling grand or petit juries."

In support of its contention appellant has cited many decisions of the courts of other States in which similar constitutional provisions have received the construction here contended for; and if the question was one of first impression in this State, we confess it would be one presenting much difficulty of solution. But whatever may be the construction elsewhere applied, the exact question seems to have been settled in this State adversely to appellant's contention by the following cases: North Texas Traction Co. v. Danforth, 58 Texas Civ. App., 419 (116 S. W., 147), writ of error denied by the Supreme Court; Brown v. State, 54 Texas Crim. Rep., 133; Lee v. State, 54 Texas Crim. Rep., 382; Smith v. State, 54 Texas Crim. Rep., 298. The assignment is overruled.

By its second assignment appellant complains that "The verdict of the jury is against the great weight and preponderance of the evidence, and is without evidence to sustain same, and is so palpably against the weight of the evidence and wanting in evidence to sustain same that it leads to the unmistakable inference that the jury, in rendering a verdict for plaintiff, was actuated by passion, prejudice, malice, or by some other improper motive."

Plaintiff contended that the rupture from which he was suffering was the direct result of the injury received by him by the derailment of the car. Defendant denied this, and attempted to show that plaintiff had been ruptured long before the date of the derailment. Upon this issue many witnesses were introduced upon each side. For the defendant, a physician, who lived at El Campo, testified that, before the date of the accident, and while the plaintiff lived there, plaintiff consulted him about the rupture and about the character of a truss to wear. Other witnesses testified that plaintiff, while at El Campo, told them he was ruptured, and two of these swore that they had seen him wearing a truss. The physician who was first called to see plaintiff after the derailment testified that plaintiff told him the rupture was old, and that he exhibited to him an old rupture truss in order that the witness might order a new one for him; four physicians who, a year after the accident, operated upon plaintiff, testified that the rupture had the appearance of long standing, and three of these testified that plaintiff admitted he was ruptured before the date of the accident, and one of them swore that he admitted he was ruptured before coming from France, many years ago. Other testimony upon the same point was introduced by defendant. This evidence, standing alone, would have compelled a finding in defendant's favor on this issue. But plaintiff and his wife stoutly denied that plaintiff was ruptured, or that he ever wore a truss prior to the date of the accident, and he denied that he had ever told the defendant's witnesses or any one else that he was ruptured prior to the derailment, or that he ever exhibited a truss to any of them. In addition to this, plaintiff introduced in evidence a mass of circumstances tending to support the testimony of himself and wife, all of which, standing alone, would have compelled a finding in his favor upon the issue. This being true, the question was peculiarly one for the determination of the jury, and the jury having resolved the issue in plaintiff's favor, their finding is conclusive upon us, and should not be disturbed. The as-

signment is overruled, as well as is also the third assignment, which raises substantially the same question.

By its fourth assignment appellant complains of the action of the court in admitting in evidence the testimony of several witnesses as to the reputation of plaintiff for truth and veracity, honesty and fair dealing while he lived in Louisiana, El Campo and the city of Houston. Appellant objected to this character of evidence upon the grounds that "it was immaterial, and did not tend to prove any issue involved, and that it was incompetent in a case of this character to introduce testimony as to reputation of plaintiff for truth and veracity or for honesty and fair dealing in the community in which he lived at the time of the accident or in other communities in which he had theretofore lived."

Plaintiff pleaded and testified that the rupture was caused by the derailment. Defendant pleaded that plaintiff did not receive any injuries in consequence of the derailment, but that such injuries existed anterior to the time of the accident and arose from causes other than the derailment. This allegation was followed up by defendant by offering the testimony of several witnesses to show that plaintiff had made statements contradictory of those made by him upon the witness stand. This was tantamount to charging, both by pleading and proof, that the plaintiff was attempting to recover for injuries which he knew were not the result of the derailment and for which he knew the defendant was not liable, and was, in effect, a charge that plaintiff was fraudulently attempting to mulct the defendant in damages which it should not pay. This was, in effect, an attack upon his credibility as a witness and an impeachment of his character for truth, and he had the right to strengthen his testimony to the effect that he was injured in the derailment, as he claimed to be, by proof of his general reputation for truth and veracity. Texas & P. Ry. v. Raney, 86 Texas, 363; Texas, C. & N. W. Ry. v. Weideman, 62 S. W., 810; Loomis v. Stuart, 24 S. W., 1078; Phillips v. State, 19 Texas Crim. App., 164; Fire Ass'n v. Jones, 40 S. W., 44; Fox v. Robbins, 70 S. W., 597; Shepard v. Love, 71 S. W., 68; Contreras v. San Antonio Traction Co., 83 S. W., 870; Missouri, K. & T. Ry. v. Dumas, 93 S. W., 493; Missouri, K. & T. Ry. v. Adams, 42 Texas Civ. App., 274 (114 S. W., 453); 1 Greenl., sec. 469.

Appellant further contends that if proof of plaintiff's good character was admissible in the circumstances, the proof should have been confined to his reputation in Houston, where he resided at the time of the accident, and not in Louisiana, where he had not lived for many years. This objection was not made in the court below, and could not have been in the mind of the court when passing upon the objection that was made, and fairness to the trial judge and to opposing counsel forbid that it be considered now when raised for the first time in this court. The fourth assignment is overruled.

By the fifth assignment appellant complains of the refusal of the court to permit it to prove by its witness Doctor Scott that, when he first called to see the plaintiff, which was the day after the accident, plaintiff was able to manipulate or reduce his rupture as one familiar with manipulating it. This witness had testified fully to the point

which defendant desired to bring out, namely, that "plaintiff manipulated and reduced the rupture in the doctor's presence on the day following the accident; that such manipulation required skill, and was not a simple matter; that a person who did not know how to reduce a rupture could not do it," and that "the probabilities are, a man would fail to reduce rupture who had never tried it before. It requires some little experience." The limit of expert privilege was reached, we think, when the witness was permitted to say that only skilled persons could reduce it, and that plaintiff reduced it; and it was not error—certainly not reversible error—to refuse to permit the witness to further testify that plaintiff reduced it as one familiar with such an operation. The assignment is overruled.

Nor was there error in permitting the plaintiff, on cross-examination of defendant's witness Doctor Slataper, to ask the questions and elicit the answers set out in the sixth assignment of error. This witness had given testimony of a most damaging character against the plaintiff, and the questions asked were well within the range of legitimate cross-examination in testing the witness.

We think the record discloses no reversible error, and that the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

Writ of error refused.

CHICAGO, ROCK ISLAND & GULF RAILWAY COMPANY v. LEE CRENSHAW.

Decided February 12, 1910.

Carriers of Live Stock—Feeding Pens—Duty to Furnish.

There is no statute imposing upon railroad companies the absolute duty of furnishing feeding and watering pens so large that cattle would receive no injury from being confined therein, and hence a charge imposing this duty would be reversible error. The true test seems to be whether the pens under all the circumstances were such as a person of ordinary prudence would have provided.

Appeal from the County Court of Montague County. Tried below before Hon. A. W. Ritchie.

N. H. Lassiter, Robert Harrison and *Speer & Weldon,* for appellant.

W. S. Jamieson and *Chas. Crenshaw,* for appellee.—It is the duty of common carriers who convey live stock of any kind to feed and water the same during the time of conveyance and until the same is delivered to the consignee, and any carrier who fails to do so sufficiently becomes liable to the party injured for his damages. Sayles' Statutes, article 326, and Galveston, H. & S. A. Ry. Co. v. Thompson, 23 S. W., 930; Gulf, C. & S. F. Ry. Co. v. Gray, 24 S. W., 837; San Antonio & A. P. Ry. Co. v. Wright, 20 Texas Civ. App., 136; Houston & T. C. R. Co. v. Brown, 37 Texas Civ. App., 595; U. S. Compiled Statutes, Act June 29, 1906, secs. 1, 2, 3 and 4.

SPEER, ASSOCIATE JUSTICE.—Appellee sued appellant to recover damages growing out of a shipment of cattle from Fort Worth to Ringgold, the principal ground of complaint being that pens at the latter place were too small, and the cattle were kept therein without feed and water for such a time as to seriously injure them. In submitting the case the court instructed the jury as to the measure of appellant's duty as follows: "It was the duty of the defendant to water and feed said cattle when necessary, and to keep them in pens large enough that they would not be damaged by being too closely crowded, and a failure on the part of defendant to perform any of said duties would be negligence, and if such negligence caused loss or injury the defendant would be liable in damages for such loss or injury, if any." This charge is complained of as imposing too great a burden on appellant company.

Article 326, Sayles' Texas Civil Statutes, makes it the duty of a common carrier who conveys live stock of any kind to feed and water the same during the time of conveyance and until the same is delivered to the consignee or disposed of as provided by law, so that in this respect the charge correctly followed the statute. But in respect to the company's duty with reference to pens the charge is not the law. The effect of the charge is to impose upon the appellant the absolute duty of furnishing pens large enough that appellee's cattle would receive no injury from being confined therein. There is no statute within our knowledge imposing this duty upon railway companies, and, indeed, this court has held to the contrary of the proposition in Fort Worth & R. G. R. Co. v. Cage Cattle Co., 95 S. W., 705, where a charge very similar to the one above quoted was condemned. See also Casey v. St. Louis S. W. Ry. Co., 37 Texas Civ. App., 48 (83 S. W., 20). The true test seems to be whether the pens, under all the circumstances, were such as a person of ordinary prudence would have provided. The company is not under the absolute duty of guaranteeing cattle against injury by reason of insufficient pens.

We have disposed of this question as though appellee's pleadings authorized the submission of this issue of appellant's liability, but it is by no means certain that such is the case, and on another trial it might be well to amend in this respect, if this issue is again submitted.

For the error discussed the judgment is reversed and the cause remanded for another trial.

Reversed and remanded.

MISSOURI, KANSAS & TEXAS COMPANY OF TEXAS ET AL. v. WASSON BROTHERS.

Decided February 12, 1910.

1.—Shipment of Cattle—Damage—Intrinsic Value.

Evidence stated and held sufficient to warrant the court in assuming in its charge to the jury that there was no market value for the cattle in question at their destination, and to use their intrinsic value in estimating plaintiff's damage.

2.—Same—Measure of Damage.

Where there is no market value for live stock at their destination, their intrinsic value should be used in estimating the damage inflicted during a shipment, and not their market value at the nearest market.

3.—Same—Negligence Without Injury—Charge.

While it is a correct proposition of law that negligence without resulting injury is not actionable, charge of the court considered and held to sufficiently state said proposition and to justify the court in refusing a special charge to the same effect.

Appeal from the District Court of Mitchell County. Tried below before Hon. Jas. L. Shepherd.

Coke, Miller & Coke, R. A. Jeffress and *Royall Smith,* for appellants.

Ed J. Hamner, for appellees.

CONNER, CHIEF JUSTICE.—This is an appeal from a judgment in appellees' favor for eighteen hundred dollars, with interest at the legal rate from May 2, 1907. The action was predicated upon negligence and resultant damage in the transportation of cattle from Big Springs, Texas, to Sedan, Kansas.

The court instructed the jury that, if they found the facts constituting negligence as alleged, and that the cattle were injured, that the measure of the plaintiffs' damage would be the intrinsic value at Sedan of the cattle killed, of which there were a number, plus the difference in value, if any, in the intrinsic value of the surviving cattle at the time and in the condition in which they were delivered, and at the time and in the condition in which they should have been delivered. It is insisted in effect that the charge is erroneous in that the evidence of no market value at Sedan is too inconclusive to authorize the assumption of that fact, and that in the absence of a market at Sedan the measure of damage was the difference, if any, in the market value at the nearest market.

I. E. Wasson testified that "there was no market for our cattle in the condition they were in at the time we arrived at Sedan; there was no place at which cattle such as these could be sold at Sedan, and there were no stock yards there—nothing except the railroad pens; no barns where cattle were sold and no commission merchants there. If there had been any commission merchants or other people there buying and selling cattle at that time I would have known of it." Claud Wasson testified that Sedan was a place of about fifteen hundred inhabitants; that he had been in and around Sedan for some time preceding the shipment; that there were no yards, commission merchants or sales of cattle there that he ever heard of. This testimony was not only admissible, but, in the absence of other evidence on the subject (and there was none other), justified the assumption by the court in his charge that there was no market value of appellees' cattle at Sedan, either at the time they did arrive or at the time they should have arrived there. Where a material fact is established by the undisputed

evidence it is not erroneous for the court to assume it in the charge; indeed, it has often been held to be erroneous to otherwise submit it. The contention that in the absence of market value at Sedan the market value of the cattle in the nearest market should govern, is distinctly contrary to the determination of this court on the same subject in the case of Atchison, T. & S. F. Ry. v. Veale & Co., 39 Texas Civ. App., 37 (87 S. W., 202).

Appellants requested special charges to the effect that, unless injury to the cattle had been shown to result from certain switching, and a certain delay at Muskogee, no damages therefor could be allowed. Abstractly the propositions are sound, but the court placed the burden upon appellees to establish not only the negligence alleged, but also that thereby the cattle were injured, and further distinctly instructed the jury that neither defendant was liable for "delays or handling" which was reasonable and necessary for the transportation. This, we think, was sufficient in any view of the case. As applicable here, what we said in the case of the Fort Worth Belt Railway Company v. Johnson (ante, 105) may be repeated: "While it is the right of a litigant to have presented in an affirmative form any group of facts constituting a defense, this right should not be so extended as to require the trial court to emphasize by a special charge each separate fact constituting the group."

These conclusions sufficiently dispose of all assignments of error, and the evidence being sufficient to support the material allegations of appellees' petition, it is ordered that the judgment be affirmed.

Affirmed.

Writ of error refused.

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY v. WELLS-FARGO & COMPANY.

Decided February 12, 1910.

1.—Carrier—Injury to Passenger—Negligence of Express Company—Recovery Over.

A passenger was fatally injured while attempting to board a railroad train at a station by coming in contact with a baggage truck which an express company had negligently placed near the train; the express company had the right by written contract to use the depot grounds of the railroad company for the conduct of its business, but there was no agreement by the express company to indemnify the railroad company for losses resulting from such a state of facts. Held, the railroad company was not entitled to recover over against the express company the damages it was required to pay to the widow and heirs of the deceased passenger. The railroad company owed a duty to the deceased as its passenger to keep its platform in a safe condition; there was no contractual relation between the express company and the deceased.

2.—Express Company—Negligence of Servant.

An express company can only act through its servants and agents in the use of baggage trucks at a railroad station, and the act of a servant in leaving a truck too near a railroad train would not, in law, be the act of the express company itself.

Appeal from the District Court of Navarro County. Tried below before Hon. L. B. Cobb.

Baker, Botts, Parker & Garwood and *Jno. L. Garrison* and *R. S. Neblett,* for appellant.—The court erred in holding and concluding as a matter of law that the defendant railroad company, on its cross-bill, is not entitled to recover over against the defendant Wells-Fargo & Company, the court assigning as a reason for the holding and conclusion that the said Wells-Fargo & Company is not liable for an injury resulting in death caused by the negligent act of its servant. Fleming v. Texas Loan Agency, 87 Texas, 238; Rigdon v. Temple Waterworks, 11 Texas Civ. App., 543; Burns v. Merchants' & Planters' Oil Co., 26 Texas Civ. App., 227.

It being shown that the negligence of the express company was the active and proximate cause of the death of Kiber, and that appellant railroad company, at most, was guilty only of passive negligence, appellant had the right to recover against the express company for whatever damages were recovered by Mrs. Kiber and children against it, and the trial court erred in not so holding. Pullman Company v. Norton, 91 S. W., 841; City of San Antonio v. Smith, 94 Texas, 266; City of Corsicana v. Tobin, 23 Texas Civ. App., 492; City of San Antonio v. Talerico, 98 Texas, 151.

The court erred in concluding and holding as a matter of law that the general use and method adopted by the servants of the Wells-Fargo & Company in the handling of the express business of the defendant express company, in the use of the premises of the defendant railroad company in the transaction of the express company's business, would not in law make the negligent acts of the express company's agent the corporate act of the express company, although the servants of the express company were lacking in ordinary care in leaving the truck so near the railroad track. Fleming v. Texas Loan Agency, 87 Texas, 238; Rigdon v. Temple Waterworks, 11 Texas Civ. App., 545; Burns v. Merchants' & Planters' Oil Co., 26 Texas Civ. App., 227.

The court erred, as a matter of law, in holding that the plaintiff was not entitled to recover over and against the defendant Wells-Fargo & Company, for the reason that the undisputed evidence shows that the direct and proximate cause of the death of Kiber was the leaving of the express trucks near the train of the defendant company by the express company itself, and not by its agents and servants, and that the leaving of said express trucks so near the train of the defendant company, without the knowledge or consent of the railroad company, was the direct and proximate cause of Kiber's death; that by reason of the leaving of the express trucks near the defendant's train by the express company itself would, in law, make it liable to the plaintiffs herein. Galveston, H. & S. A. Ry. Co. v. Pigott, 54 Texas Civ. App., 367; Fleming v. Texas Loan Agency, 87 Texas, 238; Burns v. Merchants' & Planters' Oil Co., 26 Texas Civ. App., 227; Pullman Company v. Norton, 91 S. W., 841; City of Corsicana v. Tobin, 23 Texas Civ. App., 492; Ott v. Johnson, 101 S. W., 534.

Alexander & Hogsett, for appellee.

BOOKHOUT, Associate Justice.—This suit was instituted by Mrs. Belle Kiber for herself and as the next friend of her minor children, in the District Court of Navarro County, to recover damages of appellant, the Houston & Texas Central Railroad Company. Mrs. Kiber is the widow of Dan Kiber, and is the mother and next friend of the minor children of the said Dan Kiber, all of whom are named in the judgment herein.

Dan Kiber received injuries by reason of being run over by a passenger train of the Houston & Texas Central Railroad Company in the city of Dallas on the 1st of October, 1907, from which he died about forty-eight hours thereafter. The Houston & Texas Central Railroad Company, appellant, by cross-bill, sought to recover over against the Wells-Fargo & Company, alleging that the negligence of said Wells-Fargo & Company approximately caused the death of the said Kiber, in that it negligently left one of its express trucks standing so near the track of the Houston & Texas Central Railroad Company that, while the said Kiber was attempting to board the train as a passenger, he came in contact with said truck, was thrown from the cars under the train and received the injuries which resulted in his death.

On the trial of the case a jury was waived, and the court, after hearing the evidence, gave judgment against the Houston & Texas Central Railroad Company in favor of the plaintiff, Mrs. Kiber and her children, for $7,500, and rendered judgment in favor of Wells-Fargo & Company and against the Houston & Texas Central Railroad Company upon its cross-bill, holding that Wells-Fargo & Company could not be held liable for the death of Kiber.

Did the trial court err in refusing to render judgment in favor of appellant over against the express company for the same amount that plaintiffs recovered from the railroad? The ground upon which the railroad company was liable to plaintiffs was that their deceased ancestor, when injured, was a passenger, and the railway company owed him the duty of exercising toward him that high degree of care due from a carrier to a passenger, and that it had failed in the performance of this duty, in that its platform was not in a safe condition for the use of persons and passengers entering its cars, and because of the company's negligence in that respect it was liable. The injuries to Kiber resulted from an express truck upon the railroad platform, which was within eighteen inches of the train, and which came in contact with Kiber, dragging him from the train and causing him to be run over, which injuries resulted in his death. The appellant introduced in evidence a written contract between the railway company and the express company, authorizing the express company to use the depot grounds of the railway company.

It is argued by appellant that the express truck was left at the place where it was by the express company, and that if there was negligence in leaving the truck at this particular place it was the negligence of the express company, and for this reason the court should have rendered judgment in favor of appellant and against the express company for the amount that plaintiffs recovered against the railroad company.

We do not agree to this contention. The express company could only act through its servants and agents in the use of the trucks, and the act of a servant in leaving the truck within eighteen inches of the car would not, in law, be the act of the express company itself. There was no contractual relation between Kiber and the express company, and that company owed no duty to Kiber to furnish him a safe platform from which to enter the cars. The railway company did owe Kiber a duty which it failed to perform, and the injuries to Kiber resulted from such failure. Even if, as argued by appellant, the servants of the express company were negligent in leaving the truck where it was left, still the court did not err in refusing to enter judgment in favor of the appellant company and against the express company. It was shown that the use made of the platform by the express company on the night of the accident was the usual and adopted method or way in which the platform was used by the express company in the transaction of its business. Under the facts as proven, the express company was not liable under the statute to plaintiffs. Sayles' Civ. Stats., art. 3017; Lipscomb v. Houston & T. C. Ry. Co., 95 Texas, 15; Galveston, H. & S. A. Ry. Co. v. Nass, 94 Texas, 255.

There is no clause in the contract between the railroad company and the express company by which the last-named company expressly agrees to indemnify the railroad company for losses resulting from a state of facts as here shown.

We think it clear that there was no error in refusing to render judgment in favor of the railway company over against the express company for the $7,500 recovered by plaintiffs. Lipscomb v. Railway Co., *supra;* Railway Co. v. Nass, *supra.*

Finding no error in the judgment the same is affirmed.

Affirmed.

J. S. DOWELL, ADMINISTRATOR, v. COLLIN COUNTY NATIONAL BANK OF MCKINNEY.

Decided February 12, 1910.

1.—Gambling Transaction—Notice to Corporation—Insufficient Evidence.

That some of the officers of an incorporated oil mill company, who were also officers and directors in an incorporated bank, knew of or conducted transactions in futures for and in behalf of the mill, would not make the bank a participant in said transactions or responsible for its officers when acting alone for the oil mill company, it not appearing that the respective boards of directors of the bank and the mill knew of, sanctioned or took any action whatever concerning said transactions. This rule applied in a suit by a bank upon promissory notes executed by a stockholder in an oil mill company, the defense being that the notes were given to carry on dealings in futures and were therefore invalid.

2.—Estates—Authentication of Claim.

The cashier of a bank having conducted a transaction between the bank and a decedent and therefore cognizant of all the facts, is the proper party to make affidavit to a claim against the decedent's estate, growing out of said transaction. A corporation can only make affidavit by an officer and the affidavit of the officer in the case will be considered as the affidavit of the owner of the claim.

3.—Same—Affidavit.

An affidavit to a claim against an estate "that there are no offsets, credits or payments due on the same," and that a certain amount is due thereon, is equivalent to saying that all legal offsets, payments and credits known to affiant have been allowed.

Appeal from the District Court of Collin County. Tried below before Hon. J. M. Pearson.

Smith & Wilcox, for appellant.—The bank could not recover its gambling debt against the oil mill company. Jones v. Akin, 80 S. W., 385; Reed v. Brewer, 90 Texas, 144; American Nat'l Bank v. Cruger, 91 Texas, 446; Kottwitz v. Alexander, 34 Texas, 689; Sondheim v. Gilbert, 5 L. R. A., 434, and authorities there cited; Jackson v. City Nat'l Bank, 9 L. R. A., 659.

The affidavit is not sufficient for the reason that it does not state that the affiant is cognizant of the facts contained in his affidavit, as is required by article 2072 of our statutes, and does not state that all legal offsets, payments and credits known to affiant have been allowed. If the administrator had allowed said notes as a claim against the estate with such an affidavit, such allowance would have been null and void. Rev. Stats., art. 2075; Anderson v. Cochran, 93 Texas, 583.

Abernathy, Abernathy & Abernathy, for appellee.—J. P. Griffin and the other stockholders of the McKinney Cotton Oil Mill Company having guaranteed to the bank that they would pay to the bank whatever balance might be due the bank at the end of the season, and the bank upon such guarantee having extended a line of credit of $100,000 to said McKinney Cotton Oil Mill Company, upon which such company checked during the season in the due course of business, and at the end of the season having adjusted their own losses among themselves, and each one having agreed to pay his pro rata share, and J. P. Griffin having agreed to pay his, and having borrowed the money from the bank and given his notes for it, J. P. Griffin can not resist payment of the notes.

The affidavit complied with the law in that it informed the administrator of the nature and character of the claim and of the amount that is due, and that all of said payments and credits had been allowed, and that the claim was just. Gaston v. McKnight, 43 Texas, 625; Crosby v. McWillie, 11 Texas, 47; Heath v. Garrett, 46 Texas, 25; Etter v. Dugan, 1 Posey U. C., 180; Trigg v. Moore, 10 Texas, 99; Dunn v. Sublett, 14 Texas, 261.

RAINEY, CHIEF JUSTICE.—This suit was brought by the Collin County National Bank against J. S. Dowell, administrator of the estate of J. P. Griffin, deceased, to recover on three promissory notes executed by said Griffin during his lifetime, aggregating $3,011.50.

The defendant plead that Griffin was a stockholder in the McKinney Cotton Oil Mill Company, and that said mill company had lost money in dealing in cotton futures, which money had been advanced to it by the bank knowing of said gambling deals; that Griffin

had executed said notes to liquidate in part the said indebtedness to the bank, and that there was a want of consideration for the execution of said notes. The court instructed a verdict for the bank and judgment was entered accordingly, from which the appeal was taken.

At the beginning of the ginning season of 1904 and 1905 the bank extended to the mill company a line of credit for $100,000, the stockholders of the mill company agreeing to hold the bank harmless. The bank honored the mill company's checks during the season, and at the close of the season there was an indebtedness of $62,000 due the bank by the mill company. In arranging this indebtedness the mill company executed a deed of trust to J. R. Gough to secure $50,000, and the bank was to carry the remainder. The directors of the mill company, in order to settle said debt, held a meeting for the purpose of getting the stockholders to agree to assess themselves, but two of the stockholders objected to being assessed, thereupon a committee was appointed to get the objecting members to agree to such assessment. The minutes show no further meeting for this purpose, but there was a fifty percent assessment of the stock paid on said indebtedness. To secure the money to pay his fifty percent Griffin executed his said three notes to the bank, the amount of same being placed to his credit, and he drew a check in favor of Gough for same, which the bank honored. During the season 1904-1905 the mill company lost money, and during that time it dealt some in cotton futures through Jesse Shain, its assistant manager. Jesse Shain was president of the Collin County National Bank, J. L. White was its cashier and active manager, and J. S. Heard one of its stockholders. The three parties last named were also on the board of directors of the McKinney Cotton Oil Mill Company, J. S. Heard being its president and manager. The mill company owned five or six ginning plants in Collin County and did a large business. About the time the dealing in futures commenced the oil mill company had on hand about 1,800 bales of spot cotton. This cotton was sold and futures carried, but no record was kept on the books of the company as to future transactions.

The contention of the appellant is, in effect, that the notes sued on were given to liquidate in part a gambling transaction, the nature of which was known to and participated in by the bank, rendering the notes void. We are of the opinion that the evidence totally fails to show that the bank participated in the illegal transactions of buying futures by the oil mill company, or had such knowledge thereof as to make it responsible therefor.

The bank in the beginning had extended to appellant a line of credit and cashed its checks until the end of the season, at which time there was due it by the oil mill company $62,000. The evidence failed to show that the bank participated in any way in any future deals, or that it paid any check of which it had knowledge that was issued by appellant to pay any loss sustained by appellant in any future transaction. The oil mill company sold about 1,800 bales of spot cotton to carry on future deals, and the proceeds of this cotton and money arising from legitimate transactions may have been expended by appellant to buy futures, and the checks drawn by the mill

company on the bank may have been for legitimate expenses of the operation of the mill company's plants. That some of the officers of the appellant, who were also officers and directors of the bank, conducted or knew of the future transactions of the oil mill company, did not make the bank a participant in said future transactions or responsible for its officers who were acting alone for the oil mill company. It is not shown that the board of directors of the bank knew of or sanctioned the dealing in futures. No action whatever is shown to have been taken by said board in relation thereto. Nor does it appear that the board of directors of the oil mill company ever formally authorized the dealing in futures, or that the board's attention was ever called to such dealings until the end of the season, when the discussion of the raising of money to settle with the bank arose, though some of the members had discussed the matter on the streets. After a consideration of all the evidence, we think the defense of illegal consideration is not proven, and the court properly instructed a verdict for plaintiff.

Another contention is that the claim was not properly authenticated, and therefore plaintiff is not entitled to recover. The affidavit attached to said claim is as follows:

"State of Texas, County of Collin:

"Before me, W. R. Abernathy, a notary public in and for Collin County, Texas, on this day came and personally appeared J. L. White, who says that he is the cashier of the Collin County National Bank and is authorized to make this affidavit; that the three notes hereto attached, each dated July 1, 1905, one for $1,000, due on or before two years after date; one for $1,011.50, due on or before one year after date; one for $1,000, due on or before three years after date, with interest thereon, are just, due and unpaid, and that there are no offsets, credits or payments due upon the same; that the sum of $3,011.50, together with eight percent interest from July 1, 1905, is due thereon, and ten percent of interest and principal as attorney's fees. J. L. White, Cashier.

"Subscribed to and sworn to before me this Jan. 18, 1907. W. R. Abernathy, Notary Public, Collin County, Texas."

No objection was made to the form of the affidavit, but the administrator rejected the claim and endorsed thereon the following: "The within claims and three notes attached presented to me as a claim against the estate of J. P. Griffin, deceased, Feb. 11, 1907, for allowance, and the same is rejected in full. This the 11th day of February, 1907. J. S. Dowell, Administrator of the Estate of J. P. Griffin, deceased."

The only objection to said authentication is: First, that it does not state that the affiant is cognizant of the facts therein contained, it appearing that he is not the owner of the claim; and second, that all legal offsets, payments and credits known to affiant have been allowed.

The bank was a corporation; therefore, could make no affidavit except by its officer, whose act was the act of the bank. The cashier, White, had conducted the transaction for the bank, was cognizant of all the facts, and the law under these circumstances will consider the

affidavit as made by the owner. The expression "that there are no set-offs, credits or payments due on the same," and that "the sum of $3,011.50, together with eight percent interest from July 1, 1905, is due thereon," etc., is equivalent to saying that all legal offsets, payments and credits known to affiant have been allowed. The affidavit is a substantial compliance with the statute in such cases provided, and the claim being rejected without the objection to want of form, the appellee was entitled to recover on the notes.

There was no error in refusing the charges requested by appellant, and the judgment is affirmed.

Affirmed.

Writ of error refused.

L. GUDERIAN ET AL. v. B. C. CLARK ET AL.

Decided February 16, 1910.

Harmless Error—Abatement—Liens—Foreclosure.

On appeal from a judgment on a purchase money note with foreclosure of the vendor's lien, appellant, the payee of the note which he had assigned to plaintiff, who resisted the foreclosure on the ground that his sale and the note were a device to raise money on land which was his homestead, the finding on this defense being against him, could not complain of the overruling of his plea in abatement on the ground that the suit was brought one day before the maturity of the note, the maker interposing no such defense and not joining in the appeal. Nor could such appellant complain of supposed errors relating to the validity or amount of plaintiff's lien or that of an intervener also obtaining a foreclosure.

Appeal from the District Court of Falls County. Tried below before Hon. Richard I. Munroe.

Associate Justice Rice being disqualified, A. O. Sandbo, Esq., was appointed Special Associate Justice in this case.

W. E. Rogers, for appellants.—The suit was premature, and should have been abated. Sayles' Civ. Stats., art. 318; Campbell v. Lane, 25 Texas Supp., 96.

S. E. Stratton and *Z. I. Harlan,* for appellee.

SANDBO, ASSOCIATE JUSTICE.—B. C. Clark instituted this suit against A. D. Guderian as the maker of a promissory note for $1,250, and sought to foreclose a vendor's lien upon a certain tract of land. L. Guderian was also made a defendant, the plaintiff alleging that he was claiming some interest in the land upon which the plaintiff sought to foreclose his alleged lien.

The defendant L. Guderian, in proper time, filed a plea in abatement, asserting that the suit was prematurely brought, and thereafter filed an answer, embracing several exceptions, a general denial, and special plea alleging that the tract of land in controversy was his homestead.

Anna Guderian, wife of L. Guderian, filed a plea of intervention,

claiming that the premises were her homestead, and asserting that she was induced to sign the deed of conveyance to A. D. Guderian by fraud, etc.

The Provident National Bank filed a petition of intervention, and asserted that it was the owner of a judgment, duly recorded and indexed against A. D. Guderian and L. Guderian, and claiming that the premises mentioned in the suit were subject to said judgment lien, and sought to have the same foreclosed.

The trial court overruled L. Guderian's plea in abatement, and the case went to trial before the court and jury, which resulted in a judgment in favor of the plaintiff against A. D. Guderian as maker of the note, for the amount due thereon, and for the foreclosure of the vendor's lien as against all three of the Guderians. Judgment was also rendered in favor of the Provident National Bank fixing its lien against the premises in controversy and foreclosing the same. L. Guderian and his wife, Anna Guderian, are prosecuting this appeal, and no other party to the litigation is complaining.

The undisputed testimony shows that the appellants executed what purports to be a deed, regular in form, conveying the land in controversy to A. D. Guderian, and, as part of the same transaction, A. D. Guderian executed the promissory note sued on, which was made payable to appellant L. Guderian, and, in due course of business, became the property of the plaintiff. Appellants asserted in their answer that the deed executed by them to A. D. Guderian was not in fact executed for the purpose of vesting title in him, but was simulated in order to enable them to borrow money on their homestead.

The case was submitted to the jury upon special issues, the first of which and the answer of the jury thereto read as follows:

"Was the conveyance of the 80 acres of land in question by Ludwig Guderian and his wife Annie Guderian to A. D. Guderian a pretended or sham sale, entered into alone for the purpose of borrowing money on the $1,200 note of A. D. Guderian herein sued on by the plaintiff Clark, or was it an actual bona fide sale and conveyance of said eighty acres to A. D. Guderian, made by them with the intention that said eighty acres of land should belong to A. D. Guderian, and that he should pay for the same?

"Answer: We, the jury, find that the said eighty acres of land in question by Ludwig Guderian and his wife Annie Guderian to A. D. Guderian was an actual bona fide sale. Paul Cluck, Foreman."

In appellants' brief there is no assignment of error charging that the finding of the jury referred to is not sustained by testimony. The tenth assignment does charge that the court erred in not granting the defendants' motion for a new trial, but when the latter is examined, in so far as it assails the verdict, it is found to be about as general as the assignment of error. It charges, in general terms, that the verdict of the jury is contrary to the law and the evidence, but does not specify any particular wherein the evidence fails to support the verdict. Hence we might have disposed of the case without critical examination of the statement of facts; however, that course has not been pursued, and a reading of the statement of facts discloses testimony which supports the finding referred to.

The first assignment of error presented in appellants' brief asserts that the court should have sustained the plea in abatement of the defendant, L. Guderian, because, allowing three days of grace, the petition shows that the suit was brought one day before the note was due. The note was due at the time the case was tried, and at the time the plea in abatement was filed; besides, no recovery was sought or obtained against L. Guderian upon the note, and A. D. Guderian, the only defendant sought to be held liable thereon, filed no plea in abatement. Hence the first assignment is overruled.

The ninth assignment complains of the refusal to give requested instructions relating to the good faith of the alleged sale of the land by appellants to A. D. Guderian, and whether or not there were certain credits to be deducted from the claim asserted by the bank. The first question was sufficiently covered by the court's charge, and therefore no error was committed in refusing the one requested by appellants. As to the amount of the bank's claim, for the reason hereafter stated, appellants can not now be heard to complain.

All the other assignments relate to matters in which the appellants L. and Anna Guderian now have no interest, and therefore they can not be heard to complain. All of their interest in the litigation was predicated upon their alleged homestead right in the land upon which the plaintiff and the bank sought to foreclose liens. The jury having found, upon evidence which supports the finding, that the deed executed by appellants to A. D. Guderian was not executed for the purpose of borrowing money, but to vest title in A. D. Guderian, the claim asserted by them necessarily falls to the ground. This being the case, they have no further interest in the subject matter of the litigation, and it is immaterial to them whether the plaintiff and the bank have or have not valid liens upon the land. In other words, L. and Anna Guderian can not assign errors for the benefit of A. D. Guderian, who is not complaining and has not appealed.

All the other assignments relate to something done or refused by the trial court in establishing and foreclosing the liens upon a tract of land belonging to A. D. Guderian, and in which appellants have no interest; and, for the reasons above stated, we conclude that it is not necessary for this court to decide the questions presented by those assignments, and the case is disposed of without expressing any opinion upon those questions.

No reversible error has been shown and the judgment is affirmed.

Affirmed.

Associate Justice Rice did not sit in this case.

Writ of error refused.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS v. I. K. HOWELL.

Decided February 16, 1910.

1.—Evidence—Opinion of Expert.

In matters involving expert knowledge, a wide range is given to opinion testimony, extending even to the very issue on trial, but the expert's opinion is not binding on the jury.

2.—Same—Delay—Precedence in Rights of Trains.

In explanation of delay in starting from a station a train loaded with cattle for transportation, the division superintendent, an expert, should have been permitted to testify that incoming passenger trains, not arrived, had right of way over the outgoing freight and prevented its being sooner started.

3.—Delay—Evidence—Sunday Trains.

In excuse for delay in transportation of cattle, it was competent for the defendant to show its usual course of business, as that it did not run freight trains on Sunday over that part of the road, the sufficiency of the excuse being for the jury.

Appeal from the County Court of Williamson County. Tried below before Hon. T. J. Lawhon.

W. E. Spell and *Luther Nichols,* for appellant.—The witness was qualified as an expert to give his opinion upon the question as to whether or not the shipment was moved by the first available and suitable train leaving the point of receipt, and the testimony was admissible for that reason. Galveston, H. & H. R. Co. v. Bohan, 47 S. W., 1050; St. Louis, A. & T. Ry. Co. v. Johnston, 78 Texas, 536; Galveston, H. & S. A. Ry. Co. v. Henning, 39 S. W., 305; Bonner v. Mayfield, 82 Texas, 234; Ft. Worth & D. C. Ry. Co. v. Thompson, 75 Texas, 501; Lawson on Expert Evidence, 91-96; Wharton on the Law of Evidence, sec. 452; M'Naghten's Case, 10 Clarke & Finnelly (Eng.), 200; Lotz v. Scott, 103 Ind., 151.

The defendant not being required to furnish special transportation for the shipment of cattle from Granger to Georgetown, the question as to whether or not it had the usual means for transportation for the same was material, and was in issue, and the evidence offered was, therefore, admissible and material. Galveston, H. & S. A. Ry. Co. v. Warnken, 12 Texas Civ. App., 645.

E. A. Strickland and *Wilcox & Graves,* for appellee.—As to whether or not the shipment went out on the "first available and suitable train," and as to whether or not "it was impossible to avoid the delay" were matters for the jury to determine from the facts introduced in evidence, and were not matters to be shown from the opinions of experts. Shelley v. City of Austin, 74 Texas, 608; De Walt v. Houston, E. & W. T. Ry. Co., 22 Texas Civ. App., 403; Locke v. International & G. N. R. Co., 25 Texas Civ. App., 145; Haynie v. Baylor, 18 Texas, 509; International & G. N. R. Co. v. Kuehn, 2 Texas Civ. App., 210.

Carrier is required to transport cattle with reasonable dispatch, and the fact that it had no regular train from Granger to Georgetown on Sunday would not excuse its unreasonable delay. Gulf, C. & S. F. Ry. Co. v. Porter, 25 Texas Civ. App., 491; Gulf, C. & S. F. Ry. Co. v. Ellison, 70 Texas, 491; Galveston, H. & S. A. Ry. Co. v. Tuckett, 25 S. W., 150.

KEY, Associate Justice.—This is a verdict for damages to a shipment of cattle transported by the defendant from Ft. Worth to

Georgetown, Texas. Verdict and judgment went for the plaintiff and the defendant has appealed.

The defendant procured the testimony of W. S. Polhemus by deposition, and he testified that his occupation was that of superintendent of the joint track of the T. & P. Ry. Co. and the M., K. & T. Ry. Co. of Texas; that his connection with such shipments as the one in question in that capacity was as follows: His office would be notified that there was a shipment to be forwarded from the stock yards, and that he superintended the handling of all traffic over said joint track; that he was familiar with the handling of such traffic; that he knew the time at which the car was delivered at Belt Junction (the point of receipt for the M., K. & T. Ry. Co.); that he knew the time that it was forwarded from Belt Junction; that he knew that the cattle in question were loaded for the "through freight train coming south and due at Fort Worth at 7 o'clock a. m.;" he knew the time that said train consumed in switching, making up and changing crews in the Fort Worth yards; he knew that a southbound passenger train on said line was due at Fort Worth at 8:30 a. m., and that said freight train had to wait at Fort Worth until the departure of the passenger train. "The only delay in said shipment occurring at Fort Worth was by reason of the fact that said cattle were loaded for the through freight train on the line of the Missouri, Kansas & Texas Railway Co. of Texas, going south, due at Fort Worth about 7 a. m., which train occupied an hour switching and making up and changing crews in the Fort Worth yards, and was then delayed until 8:55 a. m. on account of passenger train from the south, due at Fort Worth at 8:10 a. m., and a passenger train going south at 8:30 a. m. Said freight train could not leave Fort Worth before these two passenger trains reached and left Fort Worth."

He also stated in his deposition that it was impossible to avoid the delay mentioned, for the reason that the passenger trains had the right of the road. The plaintiff objected to that statement upon the ground that it involved the conclusion of the witness, and the ruling of the court in sustaining that objection is presented in the first assignment of error. The witness was an expert in the matters about which he purposed to testify. In Galveston, H. & H. Railway Co. v. Bohan, 47 S. W., 1050, it was held by the Court of Civil Appeals for the First District that it was competent for a witness who had had experience in the care of railroad tracks to testify that it was necessary to have a track-walker at the place where the plaintiff was injured. In dealing with that question the court said:

"The witness C. H. Jones testified as an expert railroad man in the care of railroad tracks. It was immaterial that he had not worked in the yard where the accident occurred within two years prior to the date thereof. He stated that he had had many years' experience as a section foreman, and had properly qualified himself as an expert whose business it was to inspect tracks. A witness testifying as an expert may give his opinion upon the very issue on trial. Scalf v. Collin County, 80 Texas, 514. The jury are authorized to disregard the testimony of an expert. They may believe or disbelieve it, as that of any other witness. Sabine & E. T. Ry. Co. v. Hadnot,

67 Texas, 503; 4 S. W., 138; Kennedy v. Upshaw, 66 Texas, 454, 1 S. W., 308. In the opinion of Jones, a track-walker was necessary in order to keep the tracks unobstructed, free or safe, so that trains could be operated over them. Other experts may have been of a different opinion, or facts may have been put in evidence tending to contradict the opinion, and from all the evidence the jury would decide the issue. Having a track-walker was a matter about which the witness could state his opinion—whether or not it was necessary, proper or customary. In the opinion of the witness it was necessary to have one. There is a very wide range given to the admission of expert testimony. Every industry has its experts, and the operating of railroads in every branch requires expert knowledge. The engineer, fireman, brakeman, conductor, section foreman and experienced men in other departments may testify as to what is usual or customary or necessary to be done in their special lines of work. Galveston, H. & S. A. Ry. Co. v. Henning (Texas Civ. App.), 39 S. W., 302; Id., 90 Texas, 656; 40 S. W., 392; Bonner v. Mayfield, 82 Texas, 234, 18 S. W., 305; Ft. Worth & D. C. Ry. Co. v. Thompson, 75 Texas, 501, 12 S. W., 742; St. Louis, A. & T. Ry. Co. v. Johnston, 78 Texas, 536, 15 S. W., 104."

The Supreme Court refused a writ of error in that case, and the ruling referred to was approved by that tribunal. In the case at bar we think the court erred in excluding the testimony. Furthermore, and aside from the question of expert testimony, it is not clear that it would not be competent for a non-expert, after stating what he had done, to testify that it was impossible for him to accomplish something which he had undertaken and failed to do. (3 Wigmore on Evid., sec. 1719 et seq.; Gulf, C. & S. F. Ry. Co. v. Richards, 83 Texas, 203; Mills v. Missouri, K. & T. Ry. Co., 94 Texas, 242.)

The second and third assignments complain of the action of the court in excluding other testimony similar in its nature to that just discussed, and, for the reasons stated, those assignments are sustained.

The fourth and fifth assignments complain of the refusal of the court to permit appellant to prove that at the time in question it did not run freight trains from Granger to Georgetown on Sundays. In our opinion that testimony was material, and the court erred in excluding it. (Galveston, H. & S. A. Ry. Co. v. Warnken, 12 Texas Civ. App., 645, 35 S. W., 73.) We do not hold that the testimony referred to would necessarily excuse the delay complained of. We merely hold that the defendant had the right to show its usual method of conducting its business; and then, with all the facts before them, it would be for the jury to determine whether or not the delay, which included a Sunday, was excusable. The other assignments are overruled.

For the errors pointed out the judgment is reversed and the cause remanded.

Reversed and remanded.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS v. W. D. MALONE.

Decided February 16, 1910.

1.—Damages—Overflow—Johnson Grass.

Where the injury by wrongful flooding of plaintiff's land consisted in impairment of the productiveness of a perennial growth thereon, such as alfalfa, the measure of damages was the difference in the value of the land before and after the injury was inflicted; and so, also, as to its like impairment by the washing upon it and growth thereon of the seeds of Johnson grass.

2.—Same.

The allowance of the value of the crop destroyed in a given year and of the depreciation of the value of the land by injury to its future productiveness, was proper, and not a double recovery.

3.—Same—Johnson Grass—Contributory Negligence—Charge.

Plaintiff's right to recover for injury to his land and by seeds of Johnson grass maturing on the right of way of defendant railway being established by verdict, the fact that the charge submitting the defense that plaintiff himself permitted such seed to mature on his land referred only to the portion so injured by defendant's acts was not cause for reversal; the evidence disproving such default of plaintiff was the same and required the same verdict as to all parts of his land; and the error, if any, was one of mere omission, unavailable in the absence of a requested instruction.

4.—Trial—Reading Decisions to Jury.

Whether counsel should be permitted, in argument, to read to the jury from decided cases, is a matter within the discretion of the trial court, and not ground for reversal unless the discretion is shown to have been abused to appellant's prejudice.

Error from the District Court of Hays County. Tried below before Hon. L. W. Moore.

Fiset & McClendon, for plaintiff in error.—The injuries to land caused by the wrongful acts of another, and resulting in the same being infested with Johnson grass and in the killing out of a stand of alfalfa thereupon, are not such permanent injuries to the land itself as would entitle the party injured to a recovery based upon depreciation in the market value of the land for such injuries. Sabine & E. T. Ry. Co. v. Johnson, 65 Texas, 389; Trinity & S. Ry. Co. v. Schofield, 72 Texas, 498; Gulf, C. & S. F. Ry. Co. v. Helsley, 62 Texas, 593; Texas & N. O. Ry. Co. v. Looney, 33 Texas Civ. App., 495; Green v. Taylor & B. Ry. Co., 79 Texas, 606; Texas & P. Ry. Co. v. Bayliss, 62 Texas, 570; Sabine & E. T. Ry. Co. v. Joachimi, 58 Texas, 456.

Will G. Barber, for defendant in error.—Where the evidence shows that a perennial plant like alfalfa is destroyed, it is not improper for the court to submit as the measure of plaintiff's recovery, if his pleading supports it, the difference in the market value of the land before and after the destruction of the plant, and if the plant itself and its roots are destroyed, that is an injury to the land, and may be so

treated and recovered for by the plaintiff. See exactly in point: Thompson v. Chicago, B. & Q. Ry. Co., 121 N. W., 447; Morse v. Chicago, B. & Q. Ry. Co., 116 N. W., 859—both cases of alfalfa and injury thereto, and decided by Nebraska court. See also Terre Haute & L. Ry. Co. v. Walsh, 38 N. E., 534; Ft. Worth & N. O. Ry. Co. v. Wallace, 74 Texas, 581; St. Louis, L. M. & S. E. Ry. Co., 95 S. W., 311; Galveston, H. & S. A. Ry. Co. v. Warnecke, 43 Texas Civ. App., 83; Texas & P. Ry. Co. v. Graffeo, 53 Texas Civ. App., 569; Missouri, K. & T. Ry. Co. v. Neiser, 54 Texas Civ. App., 460; Houston & T. C. Ry. Co. v. Smith, 46 S. W., 1046; Hooper v. Smith, 53 S. W., 65; Baker v. Mims, 14 Texas Civ. App., 413; Owens v. Missouri Pac. Ry. Co., 67 Texas, 679; International & G. N. R. Co. v. McIver, 40 S. W., 438; Pacific Exp. Co. v. Lasker Real Est. Co., 81 Texas, 83; Dwight v. Elmira, C. & N. Ry. Co., 132 N. Y., 200, 30 N. E., 398; Bailey v. Chicago, M. & St. P. Ry. Co., 19 L. R. A., 658; Missouri, K. & T. Ry. Co. v. Goode, 7 Texas Civ. App., 245; Doty v. Quincy, O. & K. C. Ry. Co., 116 S. W., 1126; Louisville & N. Ry. Co. v. Kohlruss, 52 S. E., 166; Missouri, K. & T. Ry. Co. v. Lycan, 47 Pac., 526; Atchison, T. & S. F. Ry. Co. v. Geiser, 75 Pac., 68; Missouri, K. & T. Ry. Co. v. Steinberger, 51 Pac., 623; Chase v. New York Central Ry. Co. (N. Y.), 24 Barb., 273; Mitchell v. Billingsley, 17 Ala., 393; Chicago & A. Ry. Co. v. Davis, 74 Ill. App., 595; Baltimore & O. Ry. Co. v. Irwin, 97 Ill. App., 337; Miller v. Kern County, 70 Pac., 549; Texas & P. Ry. Co. v. Gorman, 2 Texas Civ. App., 144.

RICE, Associate Justice.—Defendant in error was the owner of a valuable irrigated farm containing 246 acres, lying in the San Marcos Valley, adjacent to the city of San Marcos, through which the railway of plaintiff in error ran, and he claims that the railway was so negligently constructed that it failed to permit the escape of surface water, by reason of which the same was impounded and held by the railway embankment, occasioning both damage to his crops and permanent injury to his land from back water standing thereon; and that plaintiff in error negligently permitted Johnson grass to mature and go to seed upon its right of way, which was scattered over, infesting his lands, thereby injuring the same; and likewise for injury suffered to his crops by depredation of stock, on account of the negligent failure of plaintiff in error to construct and maintain proper and sufficient cattle-guards where the railroad entered his enclosure.

Plaintiff in error replied by general and special exceptions, general denial, and by plea of contributory negligence, that defendant in error, by the construction of irrigating ditches and dikes, etc., had so changed the natural flow of the water and the lay of the land as to thereby prevent the escape of the surface water flowing over his premises, whereby the injury was occasioned.

There was a jury trial, resulting in a verdict and judgment for defendant in error on each of the issues pleaded, from which this writ of error is sued out.

Plaintiff in error urgently insists that the court erred in permitting a recovery on the part of the defendant in error, on account of the alleged permanent injury to his land by reason of the thinning out

and destroying of the stand of alfalfa and the seeding of his land with Johnson grass, and by its first assignment of error urges that the trial court erred in refusing to give its special charge to the jury upon this subject, which is as follows, to wit: "The jury are instructed that, under the pleadings and evidence in this cause and the law applicable thereto, the plaintiff is not entitled to recover in any sum upon his alleged claim for alleged permanent injuries to said land, if any, by reason of Johnson grass or the killing of alfalfa thereupon, and upon said item of plaintiff's suit you will return a verdict for the defendant."

And by its second assignment it contends that the trial court committed error in subdivision 3 of its main charge to the jury in permitting the jury to find in favor of plaintiff for permanent injuries and depreciation in market value of plaintiff's land, by reason of thinning out and injury to alfalfa growing upon twenty acres of said land, because the depreciation in market value of said land was not the measure of plaintiff's damage for said alleged injury; and by its proposition thereunder, in effect, insists that the true measure of damages in such cases is the value of the injured products, and not the difference in the value of the land before and after the overflow.

The third paragraph of the court's main charge to the jury reads as follows: "The statute law of Texas provides that it shall be unlawful for any railway company doing business in this State to permit any Johnson grass to mature or go to seed upon its right of way, and it provides further, that any person owning, leasing or controlling land contiguous to such right of way may recover from such railway company as damages any sum he may have been damaged by reason of such company permitting Johnson grass to mature or go to seed on said right of way, provided only that the person owning, leasing or controlling such lands does not himself permit Johnson grass to mature or go to seed thereupon, and if he does so he shall not be permitted to recover from the railway company. Now, if you find from the evidence in this case that the defendant company did, as alleged by the plaintiff, during the year 1906, and during the year 1907, prior to the sale of the land in question by the Wood National Bank, allow or permit Johnson grass to mature and go to seed upon its right of way, and that such seed were caused by the water to float over and settle upon the said twenty acres of land, and caused to grow and infest same, then plaintiff would be entitled to recover any damage to the land occasioned thereby, provided only he did not himself allow such Johnson grass to mature and to go to seed upon the said land. And if you further find from the evidence that there was certain other land adjacent and contiguous to the said twenty acres of land so owned and controlled by the plaintiff and upon which Johnson grass made seed; that the seed from such other land was carried to and upon the said twenty acres of land by the water; that such seed from such other land were so caused to be carried upon the said twenty acres of land by reason of the defendant obstructing (if it did) the natural flow of the water which carried such seed; and if you further find that such seed from such other land would not have been carried by the water to or upon the said 20 acres of land but for

the acts of the defendant, if any, in obstructing the natural flow of such water and diverting same to and throwing it upon the said twenty acres of land, if it did; and if you further find that in obstructing said natural flow of water, if it did, and in causing same to be diverted to and thrown upon said twenty acres of land, if it did, the defendant was guilty of negligence, and that as the direct and proximate result of such negligence, if any, Johnson grass seed from such other land was thereby caused to be so thrown upon and over the said twenty acres of land, and that same infested and grew upon the said land, and that thereby the said land was depreciated and damaged in its current market value, then defendant would be responsible to plaintiff for said damage. And if you further find that defendant did obstruct the natural flow of the water by its track and roadbed, and that by reason of such obstruction thereof the water was caused to back out over and stand on the growing crops of alfalfa on the said land, and that thereby same were thinned out, and that thereby the land itself, as distinct from the crops, was depreciated in its current market value, then defendant would be responsible to plaintiff for such damages, if any. If you find under the charges next above given you that Johnson grass seed from the defendant's right of way and from such other land have been deposited on the twenty acres of land in question, and that the alfalfa growing thereon has been thinned out and partially destroyed between date of September 11, 1905, and the date of sale of same by said bank, and that under the charges given you above the plaintiff is entitled to recover damages to the land by reason thereof, then the measure of such damage would be the difference, if any, between the fair and reasonable market value of said land in the condition in which it was at the time it was sold by the Wood National Bank and what would have been the value at the time but for such act upon the part of the defendant, if any, in causing, if it did, such Johnson grass seed to be deposited on the land, and the said alfalfa to be thinned out or partially destroyed; but you will not consider any injury, if any, occurring prior to September 11, 1905. And if you find for plaintiff any damages upon this branch of the case you may allow him, as a portion thereof, interest at the rate of six percent per annum from the date of the sale of said land by said Wood National Bank to this date. In determining whether said land was itself depreciated in its market value by reason of any thinning out or partially destroying the stand of alfalfa thereon, if you find that same was thinned out or partially destroyed, you are instructed that mere lessening the amount of the crop which was produced during the year 1906 and the year 1907 upon the said land would not authorize a recovery upon this branch of the case as to the alfalfa, unless the thinning out and partially destroying of the alfalfa, if it was done, in addition lessened the then existing market value of the land itself as distinct from the crop of alfalfa which had already been grown and harvested thereon."

Defendant in error, by his counter-proposition, contends that where the evidence shows that a perennial plant like alfalfa is destroyed, it is not improper for the court to submit as the measure of plaintiff's

recovery, if his pleading and the evidence supports it, the difference in the market value of the land before and after the destruction of the plant; and if the plant itself and its roots are destroyed, that is an injury to the land, and may be so treated and recovered for by the plaintiff.

The evidence discloses that defendant in error, prior to the institution of this suit, had twenty acres of land adjacent to the railway planted in alfalfa, upon which there was a good and sufficient stand, and that during the years 1906 and 1907 said crops of alfalfa were destroyed and injured by reason of back-water standing thereon, and that the land itself, separate and apart from the crops, suffered permanent injury in greater amount than that found by the jury; that other portions of the farm during said years were planted in cotton, corn and other products, which were depredated upon by stock on account of the failure on the part of plaintiff in error to construct proper and sufficient cattle-guards where its roadway entered said premises. It is also shown that said tract of land was seriously damaged and injured by reason of Johnson grass, which had been allowed to go to seed upon said railway right of way, and which was carried by said back-water upon defendant in error's premises, as well as Johnson grass seed from a nearby tract of land which, but for the imperfect construction of said railway, would not have been washed thereon. It was alleged and also proven that alfalfa is a perennial crop, and that, unlike wheat, oats or other grain, would continue to grow each season from the original planting, without the necessity of replanting it, unless killed out by water or in some other way, and that it grows each year from the roots; and it was proven that land planted in alfalfa had been known to continue producing for more than twenty years without being replanted; that the land in question had a fine stand of alfalfa on it, much of which had been killed out by the water, until it had reached the point where it would all have to be plowed up; that a whole year would have to be devoted to killing the Johnson grass by plowing it up before it could be re-seeded in alfalfa. It was shown to have been impracticable and impossible to have re-seeded the land in alfalfa without first killing out the Johnson grass, and that no crop could have been made thereon for the succeeding year, and that the value of the land was materially affected by the Johnson grass, which had been washed thereon from the right of way and the adjoining tract, and the thinning out of the alfalfa by the water.

The question, therefore, to be determined is: What, under the pleadings and evidence, was in fact the true measure of damages in this case? Is the defendant in error only entitled to recover the value of the crops injured or destroyed, together with the amount necessary to re-seed and re-plant the land, plus the rental value of the land while idle, as plaintiff in error seems to contend, or is he entitled to the value of the crops so injured or destroyed, together with the difference in the value of the land before and after the overflow? While the authorities, it seems, are not uniform upon this question, yet we believe the better rule is with the weight of authority, which sustains the ruling of the court below.

In the case of Ft. Worth & N. O. Railway v. Wallace, 74 Texas, 581, where a fire had burned over native grass, destroying the same and injuring the turf and grass roots, it was held that the difference in the value of the land before and after the injury was the correct measure as to the injury done to the roots of the grass and turf, Judge Stayton saying: "Such an injury is one in its nature permanent, though it may not be perpetual, and differs from the injury to a growing crop, which does not result in any injury to the land, as distinguished from the crop."

Where timber has been injured or destroyed, it has been held that the true measure of damages is the difference in the value of the land before and after the destruction of the timber. See Missouri, K. & T. Ry. v. Neiser, 54 Texas Civ. App., 460, 118 S. W., 166; International & G. N. Ry. v. McIver, 40 S. W., 438; Missouri, K. & T. Ry. v. Goode, 7 Texas Civ. App., 245, 26 S. W., 441.

In Baker v. Mims, 14 Texas Civ. App., 413, 37 S. W., 190, involving, among other things, the destruction of turf in plaintiff's pasture by reason of the driving of a herd of cattle over the same, it was held by the court that the difference in the market value of the land before and after the trespass was the proper measure of damages.

In Owens v. Missouri Pac. Ry., 67 Texas, 679, the injury complained of was the destruction of the grass in plaintiff's pasture by water standing thereon, and it was there held that the difference in the value before and after the injury was the correct measure of recovery.

Texas & Pac. Ry. v. Gorman, 2 Texas Civ. App., 144, 21 S. W., 158, where injury was done to growing fruit trees, grape vines and blackberry vines by fire, it was held that the better rule with reference to the measure of damages was the difference in the value of the land before and after the injury; but it was suggested that if the appellee was willing to waive that and accept the cash value of his trees, the appellant could not complain. See also Hooper v. Smith, 53 S. W., 65; Texas & P. Ry. v. Graffeo, 53 Texas Civ. App., 569, 118 S. W., 873.

In the case of Wiggins v. St. Louis M. & S. E. Ry., 95 S. W., 311, where, among other questions before the court, one was as to the measure of damages for injuries suffered by the plaintiff to a timothy meadow from fire, in which the roots of the plant were destroyed, it was held by the court that the injury was really to the inheritance, and that the measure of damages for such injury is the difference in the value of the premises before and after the fire.

In Doty v. Quincy, O. & K. C. Ry. Company, 116 S. W., 1126, the same rule was applied, where the injury was to growing fruit trees that had been destroyed, treating the trees as a part of the realty.

In the case of Louisville & N. Ry. v. Kohlruss, 52 S. E., 166, the same rule was held by the Supreme Court of Georgia with reference to the destruction of ornamental trees. And in Missouri, K. & T. Ry. v. Lycan, 47 Pac., 526, the Supreme Court of Kansas applied the same rule in case of the destruction of growing apple trees, grape and blackberry vines. See also Chase v. New York C. Ry., 24 Barb., 273; Galveston, H. & S. A. Ry. v. Warnecke, 43 Texas Civ. App., 83,

95 S. W., 600, in which the destruction of fruit trees and vines was involved, where it was held that if plaintiff sued only for the value of the trees and vines destroyed he could not recover for the injury to the realty, but, upon proper allegations, he would be entitled to recover for the injury to the realty involved in their destruction.

In Dwight v. Elmira, C. & N. Ry., 15 L. R. A., ——; 132 N. Y., 200; 30 N. E., 398, Justice Parker, of the Court of Appeals of New York, held that the measure of damages for the destruction of fruit trees is the difference in the value of the realty before and after the destruction.

For other cases very much in point, see Thompson v. Chicago, B. & Q. Ry., 121 N. W., 447; Morse v. Chicago, B. & Q. Ry., 116 N. W., 859; Terre Haute & L. Ry. v. Walsh, 38 N.E., 534; Miller v. Kern County, 70 Pac., 549, 137 Cal., 516; the first two of which involved permanent injury to land by reason of the destruction of alfalfa crops.

We think alfalfa and other perennial grasses may be likened to our native grasses, and where the roots thereof are destroyed by water, fire or any other agency, that the damage is one to the inheritance, for which the owner is entitled to recover, and therefore conclude that the trial court was correct in submitting that the proper measure of damages in this case was the difference between the value of the land before and after the injury, and, so believing, we overrule these assignments.

The third assignment complains that the trial court committed error in permitting the jury to find for defendant in error the depreciation in the market value of the land by reason of Johnson grass growing thereon, as the result of defendant's permitting grass to go to seed on its right of way, and as a result of Johnson grass seed being washed upon said land by the obstruction of the surface water. We think this, in effect, raises the same question as presented by the first and second assignments, and that the principle involved in each is the same. See Doeppenschmidt v. International & G. N. Ry., 46 Texas Civ. App., 576, 102 S. W., 950; s. c., 120 S. W., 928, where the same measure of damages was applied as here. We therefore overrule this assignment.

The court in subdivision 2 of its charge permitted a finding in defendant in error's favor for injury to the alfalfa crops of 1906 and 1907. It is contended on the part of plaintiff in error that this charge was inconsistent with the item of damage submitted in subdivision 3 of the court's charge with reference to the permanent injury to the land on account of the thinning out of the alfalfa growing thereon, contending that the same permitted a double recovery. We can not agree with this contention, because where the crops of alfalfa are thus destroyed, and also the stand and the roots thereof are permanently affected, the owner would have the right to recover for the damage to the crops, as well as for the permanent injury to the land by reason of the destruction of the plant itself. We therefore overrule the fourth and fifth assignments presenting this question.

We think the criticism of the charge under the sixth assignment is hypercritical.

By the seventh assignment plaintiff in error claims that the court erred in the second sentence of subdivision 3 of its charge hereinbefore quoted, wherein the jury were instructed that if they should believe from the evidence that the railway company, during the years 1906 and 1907, permitted Johnson grass to mature and go to seed upon its right of way, and that such seed were by the water caused to float over and settle upon the twenty acres planted in alfalfa, thereby infesting the same with such grass, then defendant in error would be entitled to recover any damages thereby occasioned to the land, provided only he himself did not allow such Johnson grass to mature and go to seed upon said tract. The vice, as contended by it, in said charge, consisted in its failure to likewise preclude a recovery on the part of defendant in error, in the event the jury should find that he also had permitted Johnson grass to mature and go to seed upon other portions of said farm. This contention is based upon the theory that the evidence was conflicting upon this phase of the case. Defendant in error suggested that if, in fact, he did not permit Johnson grass to mature and go to seed on the twenty acres of land in question, then his right to recover should not be defeated because he may have permitted some to go to seed upon other and remote portions of the farm, because he says that the same evidence which established that plaintiff did not allow Johnson grass to go to seed upon the twenty acres also established that he did not allow it to seed upon the remainder of the tract. The jury having accepted plaintiff's testimony as to the twenty acres, it necessarily followed that identically the same evidence would have called for a finding by the jury that the same was not permitted to go to seed upon any portion of the remainder of the tract.

We are inclined to agree with defendant in error; especially so since, as he says, there is no affirmative error in the charge complained of; and as no special charge was requested upon this subject, we do not think that plaintiff in error is in any attitude to complain of the supposed error.

Nor do we think there was error, as complained of in the twelfth and thirteenth assignments, in the trial court's permitting plaintiff's counsel to read, in the presence of the jury, extracts from certain court decisions, and in failing to retire the jury at the request of defendant's counsel during such readings. These matters are wholly within the discretion of the trial court; and where, as in this case, there is no abuse of this discretion shown, no error can be predicated thereon. See Western U. Tel. Co. v. Wingate, 6 Texas Civ. App., 394, 25 S. W., 439; Gulf, C. & S. F. Ry. Co. v. Dunlap, 26 S. W., 655; Missouri, K. & T. Ry. v. Smith, 101 S. W. 453.

The remaining assignments complain chiefly of the insufficiency of the evidence to support the judgment; and, while it is true, the evidence was conflicting, yet it is ample, in our opinion, to support the verdict. We therefore overrule these assignments. And, since we find no error in the proceedings of the trial court, its judgment is in all things affirmed.

Affirmed.

Writ of error refused.

F. H. BALDWIN ET AL. v. CITY OF SAN ANTONIO.

Decided February 16, 1910.

1.—Appeal—Immaterial Assignments—Practice.

Where on appeal no complaint is made of the amount of the verdict and judgment, assignments of error based upon the admission and exclusion of evidence as to the amount of damages will not be considered because immaterial.

2.—Condemnation Proceedings—Appeal—Interest on Award.

A city by proper and regular proceeding condemned a strip of land for street purposes; the owners of the land appealed from the award; the city made the deposit and executed the bond required by law and took possession of the land in controversy; upon trial of the appeal in the County Court a verdict was rendered against the city for a larger amount than the commissioners awarded. Held, that the owners were entitled to interest at the legal rate only on the difference between the amount of the award and the amount of the verdict from the date the city took possession of the land.

Appeal from the County Court of Bexar County. Tried below before Hon. P. H. Shook.

Clinton Brown, F. C. Davis and *Denman, Franklin & McGown,* for appellant.—The law allows the owner the value of the property at the time it is taken. The debt is then due, though an unliquidated demand or claim for damages, and bears interest from that date. Watkins v. Junker, 90 Texas, 597; Texas & P. Ry. Co. v. Tankersley, 63 Texas, 61; Snowden v. Shelby County, 102 S. W., 90; Drury v. Midland Railway Co., 127 Mass., 573; Chandler v. Jamaica Pond Aq. Co., 125 Mass., 545; Sioux City Ry. Co. v. Brown, 14 N. W., 407; Lewis Em. Dom., sec. 499.

Joseph Ryan, for appellee.

NEILL, ASSOCIATE JUSTICE.—This case arises from proceedings instituted by the city of San Antonio by authority of section 98 of its charter for the purpose of appropriating a strip of land 139 4/10 feet long and 17 feet wide, which is definitely described in the ordinance passed by the City Council for that purpose, which was owned in common by the appellants, Julia A. Anderson, Frank H. Baldwin and J. N. Brown, in order to widen West Houston Street. Others than those whose names are just mentioned were made parties to the proceedings.

The appellants did not question the right of the city to condemn and take the property, the only issue being as to its value. The commissioners who were duly appointed to assess the damages, on May 25, 1907, awarded the appellants each the sum of $5,000, aggregating $15,000 damages. Whereupon the city, in accordance with the statutes (art. 4471, Rev. Stats. of 1895, as amended by the Acts of 1899, p. 105), deposited in the County Court of Bexar County, where the proceedings were pending, the sum of $30,500, being

double the amount of the entire damages awarded appellants as well as to two other parties to the proceedings, executed a bond, as required by the statute above referred to, conditioned for the payment of any further costs that might be adjudged against it, and on June 26, 1907, entered upon and took possession of the property. These appellants, being dissatisfied with the award, filed their objections thereto within the time prescribed by law, and appealed to the County Court, where the case was tried before a jury, who were instructed by the court to find what was the reasonable value of the property, with the improvements thereon, at the time it was actually taken. The jury found the value to be $17,700. The appellants then prayed the court that interest at the rate of six percent per annum from June 26, 1907, the time the property was actually taken, be adjudged in their favor upon the value of the property found by the jury. This the court refused, but entered judgment in favor of the appellants for the sum of $17,700, and ordered that said sum, together with the costs, be paid them by the clerk of the court out of the fund deposited by the city, from which judgment this appeal is prosecuted.

As none of the assignments of error complain of the valuation of the property assessed by the jury, we will not consider those assignments of error (Nos. 1 to 5 inclusive) which complain of the exclusion of testimony offered by appellants and of the admission of testimony introduced by appellee over their objections. For, as no complaint is made here of the verdict, the question as to whether such testimony was wrongfully excluded or admitted becomes purely academic.

The sixth assignment of error complains of the court's refusal to allow appellants interest on the value of the property as found by the jury from June 26, 1907, to date of the judgment, and of its failure to provide that the judgment should bear interest from its date. The contention of appellee is that, inasmuch as it made the deposit of the money and executed the bond, as required by the Act of April 15, 1899, amending article 4471 of Revised Statutes of 1895, the appellants are not entitled to interest from the date of the taking of their property.

The general rule is that, where land is taken by right of eminent domain, the owner ordinarily is entitled to recover interest from the date of its taking. (Sedgwick on Damages, sec. 318.) As is said by Chief Justice Shaw, in Parks v. Boston, 15 Pick., 198, taking of land under such right is equivalent to a purchase, and the delay in payment must be compensated by interest. And it is said by Lewis on Eminent Domain, sec. 499, that: "Where, pending an appeal, the party condemning deposits the damages awarded and takes possession, if the owner secures an increase of the award, he should have interest on the whole award from the date of possession." The decisions cited by the author, in so far as they are accessible to us, seem to proceed upon the principal that, when the Constitution provides that private property can only be taken for public use, against the consent of the owner or owners, by actually making or providing just compensation therefor, and that when the damages assessed on appeal are greater than the damages found by the award appealed from, to permit the taking

of private property for a public use upon the payment of the sum of money first awarded as damages would be without making or providing just compensation therefor. And for that reason the owner of the property taken in violation of the Constitution should have interest upon its full value from the time it was taken until the time such value is finally determined on appeal.

But the Constitution of this State (article 1, section 17) provides that: "No person's property shall be taken . . . for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made or secured by a deposit of money."

It is provided by article 4471, Revised Statutes of 1895, as amended by the Act of April 15, 1899, that: "In no case shall such corporation be entitled to enter upon and take the property condemned without first having paid whatever amount of damages and costs may have been awarded or adjudged against it by such commissioners, or deposited money to cover the same in the court wherein such condemnation proceedings are pending. But if the plaintiff in the condemnation proceedings should desire to enter upon and take possession of the property sought to be condemned pending litigation, it may do so at any time after the award of the commissioners upon the following conditions, to wit:

"First. It shall pay to the defendant the amount of damages awarded or adjudged against it by the commissioners, or deposit the same in money in court, subject to the order of the defendant, and also pay the costs awarded against it.

"Second. In addition thereto, it shall deposit in said court a further sum of money equal to the amount of the damages awarded by the commissioners, and which shall be held, together with the award itself (should it be deposited in court instead of being paid), exclusively to secure all damages that may be awarded or adjudged against the plaintiff; and it shall also execute a bond with two or more good and solvent sureties, to be approved by the judge of the court in which such condemnation proceedings are pending, conditioned for the payment of any further costs that may be adjudged against it, either in the court below or upon appeal."

This statute, if complied with in accordance with the constitutional provision referred to, gives full security to the owner, by a deposit of money, for the taking of his property. In this case appellants' pleadings show a compliance by the city with the provisions of the statute quoted. "The almost unbroken line of decision is that there is no valid objection to a statute like ours, which permits the condemning party to pay the assessed damages into court for the use of the land-owner, and that such payment is equivalent to a tender, and confers a license to take possession even when an appeal is prosecuted." See Consumers' Gas Trust Co. v. Harless, 15 L. R. A., 505, and authorities cited at page 508.

Of the sum of money deposited by the appellee before taking the property, the appellants only had the right to take the sum of $15,000. To that extent it was an equivalent to a tender; but they had

no right to take the $2,700 found by the jury in excess of the amount of the award appealed from. As one to whom money is owing is not, after payment thereof has been legally tendered him, entitled to recover interest thereon, we hold that appellants were not entitled to recover any interest on $15,000 of the sum, $17,700, adjudged them on appeal; but as to the balance, $2,700, they are entitled to recover interest thereon at the rate of six percent per annum from June 26, 1907, to this date. The judgment of the County Court will be so modified as to allow them such interest on said amount, and, as thus modified, it will be affirmed.

Modified and affirmed.

SAN ANTONIO TRACTION COMPANY v. ANNIE PROBANDT.

Decided February 16, 1910.

1.—Personal Injuries—Negligence—Charge.

In a suit for damages for personal injuries the court charged the jury in part as follows: "If you believe from the evidence that . . . the plaintiff was a passenger on one of defendant's street cars . . .; and that the said car upon which plaintiff was a passenger, if you believe she was a passenger, was derailed as alleged in plaintiff's petition; and if you further believe from the evidence that such derailment, if any, was directly caused by negligence of defendant, if any, as alleged in plaintiff's petition; and if you further believe from the evidence that by reason of such derailment, if any, the plaintiff received any injuries alleged in her petition, then I charge you your verdict must be for the plaintiff." Held, while the charge did not submit the question of negligence or not as clearly as might have been done, it was not subject to the objection that it assumed that defendant was guilty of negligence.

2.—Carriers—Derailment—Presumption of Negligence.

The derailment of a railway car warrants the presumption of negligence on the part of the railway company, and the presumption prevails until the derailment is otherwise accounted for.

3.—Personal Injuries—Diminished Earning Capacity—Pleading.

In a suit for damages for personal injuries plaintiff alleged that she had an earning capacity of $50 per month previous to her injuries, with a reasonable expectation of increasing the same, but that since her injuries she has been bed-ridden and unable to perform any kind of labor and that the injuries were permanent. Held, sufficient to present the issue as to future earning capacity.

Appeal from the District Court of Bexar County. Tried below before Hon. A. W. Seeligson.

Ogden, Brooks & Napier, for appellant.—The paragraph of the charge complained of is erroneous, in that it did not submit to the jury the question of the defendant's negligence *vel non* as a question of fact, but assumed that the defendant was guilty of negligence. International & G. N. R. Co. v. Brice, 95 S. W., 662; Texas Midland Ry. Co. v. Booth, 35 Texas Civ. App., 322; St. Louis S. W. Ry. Co. v. Wright, 84 S. W., 270; Missouri, K. & T. Ry. Co. v. Wolf, 40 Texas Civ. App., 381; North Texas Traction Co. v. Moberly, 109 S. W., 484.

The charge is erroneous in permitting the jury to award plaintiff damages for impaired capacity to labor and earn money in the future, because there is no pleading on which to base such a charge and no recovery is prayed in plaintiff's petition for such diminished capacity to labor and earn money in the future. Houston & T. C. Ry. Co. v. Lindsey, 51 Texas Civ. App., 67; Galveston, H. & S. A. Ry. Co. v. Henefy, 115 S. W., 59; City of Rockwall v. Heath, 90 S. W., 514; Lodwick Lumber Co. v. Taylor, 39 Texas Civ. App., 302; Dallas Cons'd St. Ry. Co. v. Hardy, 86 S. W., 1053.

Frederick Murphey and *Perry J. Lewis* and *H. C. Carter,* for appellee.

FLY, ASSOCIATE JUSTICE.—This is a suit for damages growing out of injuries alleged to have been inflicted upon the person of appellee through the negligent derailment of a car belonging to appellant upon which appellee was a passenger. The cause was tried by jury and resulted in a verdict and judgment in favor of appellee for $15,000.

The evidence is sufficient to form a basis for concluding that appellee was seriously and permanently injured through the negligent derailment of a street car being operated by appellant for hire, upon which appellee was a passenger. In this connection, to dispose of the contentions that appellee was not injured through the agency of appellant but by falling down stairs, and that the verdict for $15,000 is excessive, we hold that there was sufficient evidence to fully establish that appellee received all of the injuries through the derailment of appellant's car and not from falling down a stairway, and that her injuries were of such a nature as to justify a verdict for the sum found by the jury. Appellee had fallen down stairs and had hurt her right arm just above the wrist, and it had not fully healed at the time of the derailment, but she had received no other injury from the fall. Appellee testified to those facts and was corroborated by her mother, brother, sister and the physician, Dr. Goeth. It is true that Mrs. Wurtz and Catherine Niggli swore that appellee received other injuries from the fall on the stairs, but both of the witnesses were prejudiced against appellee and her family, and their testimony could readily be discarded by a jury.

The evidence was that, when the derailment took place, appellee's neck was thrown against one of the iron bars running across the windows, and she was so badly shocked and injured that she had to be carried out and she could not hold up her head. The injury was inflicted in June, 1908, and appellee testified that she had been confined to her bed most of the time, and had suffered with her neck since that time, and was compelled to wear a brace to hold her head up. She had her neck in plaster of paris for a while. She has no control of her head when the brace is taken off. She is very weak and sleeps but little. A physician testified that he found a piece of bone broken from one of the vertebræ of the spine; that his theory was that the posterior muscles were torn loose from their attachment to the bone, and caused her head to fall forward. Another physician

testified to the same effect, and that she was in a very nervous state, and had a very rapid pulse—never below 115 or 120, even when she was lying down and quiet. The muscles of one side of the neck are atrophied and wasting away. The evidence of the physicians was that appellee's condition was serious and permanent, and that she requires constant attention and nursing. Dr. Goeth testified: "There is very little hope—practically no hope—of improving her condition. I don't think she will ever get any better; I feel sure she will get worse. I have not seen any other cases just like this. I base my opinion that she will get worse on the fact that she is steadily going down, her general condition is getting worse all the time. . . . This lady, in my opinion, won't get any better; my opinion is she will die in a few years, but I can't fix the date; my opinion is, two or three years, because her circulation is so feeble. My opinion is she is going to get paralyzed after this over-excitement of the leg passes off; it always starts with over-excitement of these nerves first, and afterwards they get paralyzed. . . . I am employed by the railroad company in this case. I approached this case very skeptically, but I am not skeptical about her condition now; I feel sure about her condition. I have seen her right along every week since she got hurt. If she was subjected to what we call the rest cure, that would not mend the neck, but would allay inflammation and pain. No amount of rest would restore her neck and her health; she has had positive rest all the time." Appellee is a young woman, and was healthy and strong before she was hurt by the derailment. The jury has fixed the amount of the damages by their verdict, and we can not, in view of the evidence, hold that the amount is excessive.

The first assignment of error complains of the following instruction to the jury: "If you believe from the evidence that on or about the 14th of June, 1908, the plaintiff was a passenger on one of defendant's street cars, going northward on Soledad Street in the city of San Antonio; and if you further believe from the evidence that the said car upon which the plaintiff was a passenger, if you believe she was a passenger, was derailed as alleged in plaintiff's petition; and you further believe from the evidence that such derailment, if any, was directly caused by negligence of defendant, if any, as alleged in plaintiff's petition; and if you further believe from the evidence that by reason of such derailment, if any, the plaintiff received any injuries alleged in her petition, then I charge that your verdict must be for the plaintiff." That charge is assailed on the ground "that it did not submit to the jury the question of the defendant's negligence *vel non* as a question of fact, but assumed that the defendant was guilty of negligence." We do not think there is any force or merit in the objection. The court did not submit the question of negligence or not to the jury as clearly as might have been done, but we do not think there was an assumption that appellant had been guilty of negligence, although the court could very properly have assumed that the unexplained derailment was the result of appellant's negligence. Appellant did not in any manner account for the derailment, and the presumption remained that it occurred through the negligence of appellant. Mexican Cent. Railway v. Lauricella, 87 Texas, 277; Gal-

veston, H. & S. A. Ry. Co. v. Fales, 33 Texas Civ. App., 457 (77 S. W., 234).

The second assignment of error attacks that part of the charge which presents as an element of damage the impairment of appellee's capacity to labor, "because there is no pleading on which to base such a charge and no recovery is prayed in plaintiff's petition for such diminished capacity." The petition alleged that appellee had an earning capacity of about $50 previous to her injuries, which she had a reasonable expectancy of increasing, but that since her injuries she had been bedridden and unable to perform any kind of labor, and there were other allegations which showed that the injuries were of such a nature that appellee could never perform any more labor. The allegations were sufficient to admit the evidence, which was received, to the effect that appellee was a helpless, bedridden woman, who would never be able to perform any more labor. Allegations that the injuries were permanent and such as to require constant nursing for appellee, and that she was unable to perform any kind of work, were sufficient to present the issue as to future earning capacity. Texas & P. Railway v. Curry, 64 Texas, 86; Galveston, H. & S. A. Ry. Co. v. Smith (Texas Civ. App.), 28 S. W., 110; Missouri, K. & T. Ry. Co. v. Johnson (Texas Civ. App.), 37 S. W., 771; Galveston, H. & S. A. Railway v. Parish (Texas Civ. App.), 93 S. W., 682.

We think the evidence showed that the jar of the derailment was sufficient to and did produce the injuries inflicted on appellee, and this conclusión disposes of the third, fourth and fifth assignments of error. The judgment is affirmed.

Affirmed.

Writ of error refused.

H. E. DUNHAM v. ORANGE LUMBER COMPANY.

Decided February 17, 1910.

1.—Demurrer to Evidence—Motion to Instruct Verdict—Practice.

A motion to instruct a verdict for defendant upon the close of plaintiff's evidence is not of the same legal effect as a demurrer to the evidence. A demurrer to the evidence withdraws the case from the jury and submits it to the court; a motion by defendant to instruct a verdict in his favor simply calls for the judgment of the court upon the strength of plaintiff's case, with the privilege, in case the decision is against him, of proceeding to develop his defense.

2.—Practice—Refusal of Charge.

It is not error to refuse a special charge when the issue presented thereby is covered by the main charge, even though the special charge be couched in better, simpler or more accurate language, provided the inaccuracy of expression in the main charge is not sufficient to mislead the jury.

3.—Breach of Contract—Measure of Damages.

For the purpose of carrying out a contract to reclaim stranded and sunken logs, plaintiff at his own cost built a boat especially adapted to such work; in a suit by plaintiff for damages for a breach of the contract by defendant in refusing to permit him to reclaim all the logs, the court charged the jury upon the measure of plaintiff's damage that in arriving at the amount of profit plaintiff may have made, all the expense of building the

boat should be taken into account along with other expenses of carrying out the contract, to be deducted from the amount to be realized from the work. Held, error. The expense of building the boat was not a part of the expense of carrying out the contract and earning the price, which was saved to plaintiff by stopping the work, and which must be deducted from the price in estimating the profits. The reasonable value of plaintiff's personal services rendered in carrying out the contract would be a proper item to be deducted from the profits.

4.—Erroneous Charge—Uncertain Effect—Practice.

When it can not be certainly determined that the verdict of a jury was not influenced by an erroneous charge, the verdict should be set aside.

5.—Contract—Employment—Time—Construction.

Where a contract of employment does not stipulate any particular length of time or term of employment, either party would have a right to terminate it at any time.

Appeal from the District Court of Orange County. Tried below before Hon. W. B. Powell.

Geo. E. Holland and *V. H. Stark,* for appellant.—Where defendant urges a demurrer to the evidence which is joined in by plaintiff, the trial court, in the event the demurrer is overruled, should instruct the jury to return a verdict for plaintiff and assess his damages. Galveston, H. & S. A. Ry. Co. v. Templeton, 87 Texas, 45; International & G. N. R. Co. v. Davis, 17 Texas Civ. App., 340; Mitchell v. Wright, 4 Texas, 283; Harwood v. Blythe, 32 Texas, 804; Booth v. Cotton, 13 Texas, 362.

(Third assignment of error).—The court erred in refusing to give special charge No. 2, requested by plaintiffs, because the same contained the correct measure of damages in this cause and was not covered by the main charge of the court. Houston & T. C. Ry. Co. v. Hill, 70 Texas, 55; Alamo Mills Co. v. Hercules Iron Works, 1 Texas Civ. App., 691; Waco Tap. Ry. v. Shirley, 45 Texas, 376; Long v. McCauley, 3 S. W., 691; Fox v. Elston, 33 S. W., 749; Sabine Tram Co. v. Jones, 43 S. W., 905; Williams v. Crosby Lbr. Co., 24 S. W., 800.

(Fifth assignment of error).—The court erred in the following portion of his charge, to wit: "In arriving at the amount of profit, if any, the plaintiff would have had under the contract, if any he had, as alleged, you will take into consideration all the expenses in building and equipping the boat, operating and running the same, and all expenses and delay incident to the work of recovering and raising and delivering logs to the mill under the contract, if any, together with a reasonable compensation for services of the plaintiff under the condition and circumstances in evidence before you, and the difference between such expenses, if less than the amount he would have received for the recovery of the logs under the contract, if any, would be the profit."

The proper method of arriving at the profits from a service is to deduct the cost and expense of performing the service from the price received therefor, and the sum remaining is the profit. Same authorities; also Wells v. National Life Ass'n of Hartford, 53 L. R. A., 33.

Where a contract for services requires an outlay of capital and personal services, such outlay should be added to, instead of being subtracted from, the amount of recovery for a breach. Wells v. Life Ass'n of Hartford, 53 L. R. A., 72; Hutt v. Hickey, 29 Atl., 456; Brent v. Parker, 1 So., 780; Rayburn v. Comstock, 45 N. W., 378; Lee v. Briggs, 58 N. W., 477; Allen v. Murray, 57 N. W., 979.

(Sixth assignment of error).—The court erred in that part of the charge wherein he instructs the jury as follows: "But, gentlemen of the jury, if you believe that the defendant, by its agent Pannewitz, contracted and agreed with plaintiff that if he would build a boat suitable for pulling and raising logs on the river that he would give him twenty-five cents a log for all logs pulled into the river belonging to the defendant, and three dollars and fifty cents per thousand feet for all sunken logs of defendant raised and delivered to defendant's mill, and no time was expressed in which he was to do the work, then the defendant would have the right to put an end to said contract when it was desired by paying for all logs recovered, and if you so believe you will find for defendant." Gulf, C. & S. F. Ry. Co. v. Jackson, 29 Texas Civ. App., 342; International & G. N. R. Co. v. Greenwood, 2 Texas Civ. App., 76; Rhodes-Haverty Furniture Co. v. Frazier, 55 S. W., 192; Mudgett v. Texas Tobacco Co., 61 S. W., 149.

Adams & Huggins, for appellee.—The court did not err in refusing to give appellant's special charge No. 2, because appellant was not bound to recover for appellee, and appellee was, therefore, not bound to receive from appellant and pay for any certain number or quantity or lot of logs. Houston & T. C. R. Co. v. Mitchell, 38 Texas, 95; Tyler Ice Co. v. Coupland, 44 Texas Civ. App., 383; El Paso Gas Co. v. City of El Paso, 22 Texas Civ. App., 313; National Oil Co. v. Teel, 67 S. W., 545; Schamberg v. Farmer, 37 S. W., 152; Roberts & Corley v. McFaddin, 32 Texas Civ. App., 47; National Oil Co. v. Teel, 95 Texas, 593; Kraft, Holmes & Co. v. Sims, 1 W. & W., 404, 405, 406; Rose v. San Antonio & M. Ry. Co., 31 Texas, 49; Summers v. Mills, 21 Texas, 77; Cold Blast Trans. Co. v. Kansas City B. & N. Co., 114 Fed., 77; Campbell v. American Handle Co., 94 S. W., 815.

REESE, ASSOCIATE JUSTICE.—In this case H. E. Dunham sues the Orange Lumber Company for damages for breach of contract, alleging damages to the amount of $15,000. Upon trial, with the assistance of a jury, there was a verdict for the defendant, and from the judgment thereon, his motion for a new trial having been overruled, plaintiff appeals.

It was alleged that defendant, in floating logs to their sawmills, had a great number thereof to become waterlogged and sink, and a great many also got out of the stream and lodged on the banks. This being the condition, the following contract was entered into, according to the allegations of the petition:

"That if plaintiff would construct, at his own cost and expense, a boat or barge suitable for the purpose of dragging logs that had drifted out upon the banks of said river and out of the bed of said

stream back into said stream, and also capable and suitable for the purpose of raising sunken logs from the bottom of said stream, and would place said boat in said stream and operate the same, and recover for defendant its logs on said condition, that it would, upon plaintiff's being placed in such position, enter into a contract with plaintiff by the terms of which it would pay plaintiff the sum of twenty-five cents for each log recovered by plaintiff that had drifted out of said stream, and $3.50 per thousand feet for all sunken logs raised by plaintiff and delivered to defendant."

It was further alleged: "That, relying upon said agreement and in good faith, this plaintiff began the construction of, and at his own cost and expense did construct and fully equip and complete, a boat suitable for such purposes and capable of doing the work required of it, at great cost and expense, to wit, the sum of $3,000. That after said boat had been finished plaintiff entered upon the work for which the same was constructed, and recovered 2,840 logs during the month of November, 2,260 during the month of December, 1,584 during the month of January, 1907, and 7,000 during the months of February and March, 1907, which defendant duly paid plaintiff for at the agreed price. That after defendant discovered the work of said boat and the profit therein to plaintiff it violated its contract and refused to enter into the contract agreed on, by which plaintiff was to have said sum and price for recovering said logs and raising said sunken logs, and refused to permit plaintiff to further operate his said boat for it as he was doing, and because thereof plaintiff's boat was of no value to him, and a total loss, and he was damaged thereby the full amount of said boat; and because defendant failed and refused to comply with its agreement and enter into said contract with plaintiff upon the terms and conditions hereinafter set out, plaintiff has suffered damage in the sum of $15,000; and in this connection it shows to the court that said boat could have been operated at a net profit to plaintiff of $750 per month in either raising logs or recovering logs, and said contract could have been reasonably worth to plaintiff the sum of $15,000 had the same been in good faith entered into as agreed by defendant, and in good faith carried out, and because of all of which plaintiff has been damaged in said sums aforesaid."

Additional damages are claimed on the ground that plaintiff built a boat for this special purpose, which was useless for any other, and that plaintiff lost in building said boat three months' time, worth $150 a month.

Defendant answered by general demurrer and several special exceptions, which, inasmuch as there was no ruling on any of them, need not be here noticed. Defendant also made general denial.

The testimony of appellant tends to show that he entered into a contract with appellee of the general character of that stated in the petition. It, however, tends to show that a verbal contract was made, and not that appellee agreed on certain conditions to enter into the contract, but that it agreed to put the verbal contract in writing, which appellant was inclined to insist upon, but which seems not to have been considered essential by either party, as appellant went ahead, built his boat, and did several months' work, for which he was

paid before he was stopped by appellee. He further testified that appellee agreed to give him such work for two years or more, or that the work would last that long.

There is no merit in the first assignment of error. Appellant is in error in the statement of fact that appellee demurred to the evidence, and of law, as to the legal consequences, if he had done so. (Eberstadt v. State, 92 Texas, 94.)

There was no error in the refusal to give the charge requested, referred to in the second assignment. The charge given by the court covered the same ground. Strictly speaking, it was not correct to interject the condition that plaintiff "was competent to comply with and perform his part of the contract," as there was no issue presented either by the evidence or pleading as to his competency. The court simply used the wrong word, meaning "ready" or "equipped," and we do not think the jury was misled thereby. We are not disposed to follow the extremely technical decisions in cases where the charge requested is merely couched in better, simpler or more accurate language than the one given by the court.

The third assignment of error is barely sufficient to require consideration. It presents the alleged error of the court in refusing appellant's requested charge No. 2. The requested charge is not set out, even in substance, but we are referred to the page of the transcript where it may be found. There is set out in full the charge by the court on the same subject, which it is insisted is erroneous. The fifth assignment assails this charge as given, and it will be sufficient to consider that assignment. This charge must be held to be erroneous. The jury was instructed that, in arriving at the amount of profit plaintiff may have made, all the expenses of building the boat must be taken into consideration, along with other expenses of carrying out the contract, to be deducted from the amount to be realized for the work. This was error. This was not a part of what would have been the expense of carrying out the contract and earning the price, which was saved to appellant by stopping the work, and which must be deducted from the price in estimating the profits. The expense with regard to the boat had been incurred by appellant to the extent, according to the petition, of $450, and it would rather seem that this should be added to, rather than subtracted from, the other damages (Hutt v. Hickey, 29 Atl., 456), but this question is not raised by the charge nor any request to charge. We think that it would be proper to deduct, as part of the expense of carrying out the contract, a reasonable compensation for the services of appellant, confining this, however, to such services as he would have personally rendered in the matter. (Long v. McCauley, 3 S. W., 691.) As the jury rendered a verdict for defendant, it might be urged, but is not by appellee's brief, that it is apparent that such verdict is predicated upon the issue of liability *vel non,* and that in such case an erroneous instruction on the measure of damages does not require a reversal. We can not, however, be sure that the verdict is not based upon a finding that appellee breached the contract as alleged, but that no damages assessed by the rule laid down were shown. For this reason the fifth assignment is sustained, which requires a reversal of the judg-

ment. In view of another trial we call attention to the confusing language at the end of this charge.

There was no error in that portion of the charge referred to in the fourth assignment. Appellant's testimony authorized the limitation of two years as the term of the life of the contract.

That portion of the court's charge objected to in the sixth assignment of error is misleading. As set out, it is error. If there was no time expressed within which appellant was to do the work, the law would imply that it was to be done in a reasonable time. Under the facts of this case this issue was not presented. We are inclined to think that what the court really meant was that if, under the contract, the employment was not to continue for any specified time, either party would have the right to put an end to it at any time, and this would be correct if there be nothing in the contract except the element of time of employment. (Houston & T. C. Ry. Co. v. Mitchell, 38 Texas, 95.) As the case is presented by the pleadings, which make no reference to any time during which the employment is to continue, and the evidence, we are unable to say whether the contract was to reclaim all of the logs then stranded or sunk, or to do such work for a specified time. If there was neither element in the contract—that is, if it did not embrace any definite quantity of logs, certain or capable of being made certain, nor any specified time of employment—we think either party could discontinue the contract at any time on reasonable notice. This question does not seem to be clearly presented by either the pleadings or evidence.

For the errors indicated the judgment is reversed and the cause remanded.

ON MOTION FOR REHEARING.

We are inclined to think that we were in error in the portion of the opinion in which it is said that if the contract did not embrace any definite quantity of logs, certain or capable of being made certain, nor any specified time of employment, either party could discontinue the contract at any time "on reasonable notice." The error was in adding to what was said about the right to discontinue the contract the condition "on reasonable notice." This language we desire to withdraw. The motion for rehearing is overruled.

Reversed and remanded.

RICE & LYON, RECEIVERS KIRBY LUMBER COMPANY, V. MAGGIE R. LEWIS ET AL.

Decided February 17, 1910.

1.—Railroad—What Constitutes—Statute Construed—Cases Followed and Overruled.

A tram-road upon which steam locomotives and log cars and ordinary flat cars were operated by a lumber company for the exclusive purpose of hauling logs to its mills, is a "railroad" within the meaning of article 3017, Rev. Stats., concerning the liability of persons or corporations operating a

"railroad" for injuries to their employees resulting in death. Receivers of Kirby Lumber Co. v. Ownes, 56 Texas Civ. App., 370, followed; Ott v. Johnson, 101 S. W., 534, overruled.

2.—Jury—Selection—"Jury Wheel" Law—Cases Followed.

The cases of Smith v. State, 54 Texas Crim. App., 298; Lee v. State, 54 Texas Crim. App., 382, and Northern Texas Traction Co. v. Danforth, 53 Texas Civ. App., 419, followed in holding that the Act of 1907 (Gen. Laws, 1907, p. 269), concerning the selection of juries in certain counties, is not in violation of sec. 56, art. 111 of the State Constitution forbidding the passage of local or special laws except in certain cases.

3.—Master and Servant—Railroad Employee—Assumed Risk—"Defect and Danger"—Statute.

The terms "defect and danger" as used in the Act of 1905 (Gen. Laws, 1905, p. 386), abolishing the defense of assumed risk in suits by railroad employees for personal injuries, are broad enough to include and do include any defective or improper and dangerous manner in which a railroad train may be made up and operated, resulting in injury to an employee.

4.—Statute—Construction—Emergency Clause.

The construction of a statute should not always be controlled by the terms of an emergency clause attached thereto. The purpose of an emergency clause and the lack of any necessity that it should be clear and specific in its terms precludes the idea that there was any intention that it should have the effect of limiting the terms employed in the body of the Act.

5.—Negligence—Contributory Negligence—Question of Fact.

Except when the evidence is undisputed, the issues of negligence and contributory negligence are always issues of fact to be determined by the jury. In a suit by a railroad employee for personal injuries caused by the derailment of a railroad logging train, while being operated in the usual and customary manner well known to the plaintiff, evidence considered and held to require the submission of the issues of contributory negligence and assumed risk to the jury and sufficient to support their finding against the defendant.

6.—Contributory Negligence—Test.

It does not necessarily follow that an employee will be guilty of contributory negligence by continuing in employment where he is exposed to dangers from the negligence of the employer in the matter of defects in the appliances and machinery furnished the employee even though the employee has knowledge thereof. It is always a question whether a person of ordinary care would have so continued.

Appeal from the District Court of Harris County. Tried below before Hon. Norman G. Kittrell.

C. R. Wharton and *Jno. G. Logue,* for appellants.—Defendants Rice and Lyon, as receivers of the Kirby Lumber Company, could not be held liable for injuries resulting in death. They are not embraced within article 3017, Revised Statutes of the State of Texas, commonly called the "Death Statute." Article 3017, Rev. Stats.; Parker v. Dupree, 28 Texas Civ. App., 341; Ott v. Johnson, 101 S. W., 534; Missouri, K. & T. Ry. Co. v. Freeman, 97 Texas, 394; Halbert v. Texas Tie & P. Co., 20 Texas Ct. Rep., 990; Asher v. Cabell, 50 Fed., 818; Fleming v. Texas Loan Agency, 87 Texas, 238; Wade v. Lutcher & Moore Lumber Co., 74 Fed., 519; Hendrick v. Walton, 69 Texas, 192; Northwestern Ins. Co. v. Gridley, 11 Fed. Cases, Case No. 5808, also found in 14 Blatchford, 107, 100 U. S., 614.

The jury-wheel law passed by the Thirtieth Legislature is unconstitutional and void, it being a special law.

Regardless of the question or issue of assumed risk, we submit that, if the manner and method of making up and operating this train of cars was negligent, or a failure on defendants' part to use ordinary care, then, under the undisputed facts, the deceased, Lewis, was guilty of contributory negligence in continuing indefinitely in the employment and actively assisting in the operation of the business in this way, and it follows as a matter of law that he would not be in the exercise of ordinary care in continuing in the service of defendants. Hence this issue should not have been submitted to the jury. Quill v. Houston & T. C. R. Co., 93 Texas, 616.

Lovejoy & Parker, for appellees.—Defendants Rice and Lyon were receivers in charge or control of a railroad within the meaning of subdivision 1 of article 3017, Revised Civil Statutes of this State. Rev. Stats., article 3017, subd. 1; Bammel v. Kirby, 19 Texas Civ. App., 198; Receivers Kirby Lumber Co. v. Owens, 56 Texas Civ. App., 370; Lodwick Lumber Co. v. Taylor, 39 Texas Civ. App., 302; Cunningham v. Neal, 101 Texas, 338; Anderson's Dict. of Law, word "Goods;" Words and Phrases, "Goods;" Murphy v. Board of F. H. of M. County, 31 Atl., 230.

The jury-wheel Act has been held to be constitutional by our Court of Criminal Appeals, in an opinion which counsel believe conclusively establishes that proposition. Smith v. State, 54 Texas Crim. App., 298.

The receivers were operating a railroad within the meaning of the assumed risk Act of 1905, and whether the death of David Y. Lewis was caused by defects and dangers which he assumed by reason of knowledge thereof depended upon whether a person of ordinary care would have continued in the service with knowledge of the defects and dangers, and this was a question to be determined by the jury in the light of the attending circumstances. Assumed Risk Statute, Act of 1905; Sayles' Supplement to Texas Civil Statutes, 1906, p. 485; Currie v. Missouri, K. & T. R. Co., 101 Texas, 478; Houston & T. C. Ry. Co. v. Alexander, 102 Texas, 497; Cunningham v. Neal, 101 Texas, 338.

REESE, ASSOCIATE JUSTICE.—This is a suit instituted by Maggie R. Lewis, surviving widow of D. Y. Lewis, in her own right and as next friend of the minor children of herself and the said D. Y. Lewis, against the Receivers of the Kirby Lumber Company, a corporation, to recover damages for the death of the said Lewis, alleged to have been caused by the negligence of defendants, their agents and servants.

It is alleged that the Kirby Lumber Company is a private corporation, and that defendants are in charge of the property and business of the corporation as receivers, and that at the date of the accident which caused the death of Lewis he was in the employment of said receivers and was engaged in the performance of his duty as a brakeman on one of its logging trains, running from a sawmill of the

said lumber company at Village Mills, a distance of twenty-seven miles, into the woods for the purpose of hauling logs to said sawmill. It was charged that while so engaged the said Lewis was killed by the derailment of the train caused by running over some cows on the track, and various acts of negligence on the part of defendants, their agents and servants in the making up and operation of said train are alleged to have been the proximate cause of the accident and consequent death of Lewis.

Defendants urged a general demurrer to the petition, which was overruled, and pleaded the general issue, and, specially, that the Kirby Lumber Company was a purely private corporation, and was not engaged in operating a railroad, within the meaning of the statute with regard to the recovery of damages for injuries resulting in death; that whatever negligence there was was the negligence of Lewis himself in making up the train in the manner it was operated. It was further alleged, with specific allegations as to the details, that Lewis assumed the risk of the danger from which he came to his death, and that he was guilty of negligence proximately causing or contributing to his death.

The case was tried with a jury, who returned a verdict for plaintiffs for $14,000. Their motion for a new trial having been overruled, defendants appeal.

Conclusions of fact.—The Kirby Lumber Company is a private corporation, the purpose for which it was created being, in substance, to do a general sawmill business, including the purchase, lease, erection and operation of all necessary sawmills, planing mills, dry kilns, tram roads and all other necessary incidents to such business in the manufacture and sale of lumber. As a part of its business the company owned and operated a railroad, commonly known as a tram road or logging road, running from one of its sawmills at Valley Mills into and through the timber for a distance of twenty-seven miles, which was used for the purpose of "logging" said mill. This tram road was built like an ordinary railroad. Various switches and branches had been built from time to time from the main tram into the woods for the purpose of reaching the timber. About eighty cars and two locomotive engines were used on the tram road. About half of these cars were log cars and the other half ordinary flat-cars, such as are commonly used on an ordinary railroad, all of them used for the purpose of hauling logs to the company's sawmills. There are no stations along the line of this railroad, and no freight or passengers were ever hauled over it for hire, and the persons operating the trains over the road had no authority to carry freight or passengers other than the property of the lumber company.

Rice and Lyon were the receivers of the Kirby Lumber Company under appointment of the United States District Court, and at the time of the accident to Lewis were engaged in carrying on the business of said company as such receivers, including the hauling of logs over the tram railroad aforesaid.

At the time Lewis was killed he was in the employ of the receivers as a brakeman on one of its trains on the road aforesaid. This train

was made up at Village Mills and started for the timber a little before daylight on the morning of March 19, 1907. There were about twenty-four cars in the train—fifteen flat-cars and nine skeleton or logging cars—and, as the train was made up, the engine was running backwards, pushing the flat-cars, which were thus in front as the train was moving, and pulling the skeleton cars, the engine being thus in the middle of the train. It was dark; there was no headlight burning on the engine, which would in fact have been useless. Lewis was riding on the front platform of the foremost flat-car, which placed him at the front end of the train as it was moving. He had an ordinary lantern in his hand, which was the only light at that end of the train. This was his usual and proper place in the operation of the train. Moving in this way, the flat-car on which Lewis was riding ran over some cattle lying on the track and was derailed; Lewis was thrown off and killed. The road was not fenced, and cattle were in the habit, at certain parts on the line, of lying upon the track at night. Lewis was well acquainted with the manner of doing the business and, in fact, all of the surroundings, having been working for the company for about a year and a half, and during the entire time of his employment had gone out daily with the crew on this train, which had been uniformly equipped and operated in this way, and he rode on the front end of the train as on this occasion. At Village Mills the lumber company had no turntable nor "Y" for the purpose of turning the engine around, so that when it came in pulling a train of logs these were placed upon sidetracks and the engine hitched on to empty cars, and in this way went back to the woods, and the uniform custom was that, in making up such train, the flat-cars would run in front and the logging cars in the rear, the engine running backwards between.

There was a conflict in the evidence as to the speed of the train at the time of the accident and whether it was being run at an unsafe rate of speed in the circumstances. The court submitted to the jury the issue of negligence in this regard, and there is no objection made in the assignments of error that the evidence did not authorize the submission of this issue or that it was not sufficient to support an affirmative finding thereon. So we find, in deference to the verdict, that the evidence on this issue was sufficient to authorize the finding of negligence on the part of the engineer in this particular, as well as in the manner in which the train was made up and operated in the particulars stated in the petition. No question being made as to the amount of the damages awarded, no finding of the facts upon this issue is necessary.

Conclusions of law.—The first assignment of error complains of the ruling of the court in overruling the general demurrer to the petition. Under the assignment the following proposition is stated: Defendants Rice and Lyon, as receivers of the Kirby Lumber Company, could not be held liable for injuries resulting in death, as such receivers. They are not embraced within article 3017, Revised Statutes of the State of Texas, commonly called the "Death Statute."

This precise question was decided by the Court of Civil Appeals of

the Fourth District in the case of Receivers of the Kirby Lumber Company v. Owens, 56 Texas Civ. App., 370 (120 S. W., 936). That was an action against Rice and Lyon, Receivers of the Kirby Lumber Company, by the father and mother of a boy who was killed while in the employment of the receivers by an accident upon one of the tram roads operated by said receivers. The sole question presented upon the appeal was the liability of the appellants under article 3017 of the statutes. The question presented by the proposition above quoted was the only question presented or decided. The court held that such a tram or logging road as was referred to in that case, and in this, was a "railroad" within the meaning of the statute, and that the appellants were liable. A writ of error has been refused by the Supreme Court (October 13, 1909).

We are aware that it has often been said by the Supreme Court that a refusal of a writ of error by that court does not always mean that all the conclusions of the Court of Civil Appeals are approved. But in the case referred to it is impossible to conceive that the Supreme Court would have refused the writ of error, unless that court judicially approved the only principle decided. So we are justified in treating the refusal of the writ of error in the Owens case as a direct decision of the question here presented. We would not be justified in treating it otherwise. Of course it does not follow that the Supreme Court intended to adopt or approve, in all respects, the reasoning by which the Court of Civil Appeals arrived at its conclusion, but that is immaterial.

This precise question was before this Court in Ott v. Johnson (101 S. W., 534), in which a different conclusion was reached. We regard the question as settled against the contention of appellants by the action of the Supreme Court in refusing a writ of error in the Owens case, *supra,* and any further discussion of it here would serve no useful purpose. In the argument at the bar counsel for appellants requested us to certify the question. We do not think it would be proper for us to do so, any more than any other question that had been directly decided by the Supreme Court. The assignment of error is overruled.

The jury in this case was drawn from the "Jury-Wheel" law (Acts Thirtieth Legislature, chap. 139, page 269), regulating the selection of juries "in all counties in this State having a city or cities therein containing a population aggregating 20,000 or more people, as shown by the United States census of the year 1900." Appellants moved to quash the panel on the ground that this law was unconstitutional, which was overruled, to which ruling they took a bill of exceptions, and by their second assignment of error present the question of the constitutionality of this law, especially on the ground that it is a special law, within the inhibition of section 56, article III, of the Constitution.

The constitutionality of this law, as against the objections here urged, has been directly upheld by our Court of Criminal Appeals (Smith v. State, 54 Texas Crim. Rep., 298; Lee v. State, 54 Texas Crim. Rep., 382). The validity of the Act was also sustained by the Court of Civil Appeals in Northern Texas Traction Co. v. Danforth,

53 Texas Civ. App., 419 (116 S. W., 147), following the decisions referred to by the Court of Criminal Appeals. A writ of error was denied by the Supreme Court in the latter case. We consider the question settled against appellants' contention, and the assignment is overruled.

The third assignment complains of the action of the court in refusing to give a special charge requested by appellants instructing the jury to return a verdict for defendants. The first proposition under this assignment is that appellants were not operating a railroad within the meaning of article 3017, Revised Statutes, and has been disposed of. Under the assignment the further propositions are stated that, under the undisputed evidence, the deceased, Lewis, (1) assumed the risk of the accident which caused his death, and (2) that he was guilty of contributory negligence. The court submitted to the jury the issue as to whether Lewis assumed the risk in the following charge:

"Respecting the defendant receivers' defense of assumed risk, you are instructed that knowledge on the part of Lewis of the dangers attending the running of the train made up and equipped in the way it was, if any there was, would not preclude him from recovering if you believe from the evidence that a person of ordinary care would have continued in the service of the defendant receivers with knowledge of such danger, if any, and would have incurred the same at the time and under the circumstances he did, if you believe him otherwise entitled to recover, under the circumstances as hereinbefore submitted to you; but if you believe that a person of ordinary care would not have continued in the service of the receivers with knowledge of the dangers, if any, or would not have incurred the risk under the circumstances deceased did, you will return a verdict for defendants."

Appellants requested the court to charge the jury that the manner of operating the logging train, with the engine towards the center of the train, was the usual and customary manner in which it had been operated, which was well known to Lewis, and that, as matter of law, he assumed the risk therefrom. Also that if Lewis knew that the train was customarily operated that way, he must be held to have assumed the risk. Both these charges were refused, as set out in separate assignments of error.

It will be seen that the court applied to the facts of this case, as part of the law of assumed risk, the provisions of the Act of the 29th Legislature (chapter 163, p. 386), which are as follows:

"Section 1. That in any suit against a person, corporation or receiver operating a railroad or street railway for damages for the death or personal injury of an employe or servant caused by the wrong or negligence of such person, corporation or receiver, that the plea of assumed risk of the deceased or injured employe, where the ground of the plea is knowledge or means of knowledge of the defect and danger which caused the injury or death, shall not be available in the following cases: . . . Where a person of ordinary care would have continued in the service with the knowledge of the defect and danger, and in such case it shall not be necessary that the servant or

employe give notice of the defect, as provided in subdivision 1 hereof."

Appellants contend that the Act has no application to the facts of this case, in that the manner in which the train was made up, with the engine in the center, running backwards, at night, which seems to have been the customary manner of its operation, was not such a "defect and danger" as come within the meaning of those terms as used in the statute, and appeal to the language of the emergency clause to support their contention. The emergency clause is as follows: "The fact that there is now no adequate law protecting employes on railroads in their employment from damage in operating defective machinery, etc." If the terms "defect and danger" are broad enough to cover the defective or improper and dangerous manner in which the train was made up and operated, we do not think they should be limited in their application to defective machinery by reason of the terms of the emergency clause of the Act. That may have been, and probably was, the most prominent thought in the mind of the Legislature, but the purpose of such emergency clause and the lack of any necessity that it should be clear and specific in its terms precludes the idea that there was any intention that it should have the effect of limiting the terms employed in the body of the Act.

Turning, then, to these terms, "defect and danger," without any limitation confining them to any particular kind of defect and danger, it seems a reasonable construction of the Act that it was intended to cover the entire field of those defects and dangers to which persons engaged in operating a railroad or street railway were exposed, as to which, as the law then existed, such employes, if they knew of such defects and dangers, were held to have assumed the risk of them, and to apply to all such cases the same rule as obtains in applying the law as to contributory negligence; that is, what a person of ordinary care would have done in the circumstances. We confess that the question is not without difficulty. We can not find that these terms, as here used, have been particularly defined in any reported case. It is remarked by the Supreme Court in St. Louis & S. F. Ry. Co. v. Mathis (101 Texas, 342), that the Act in question practically abolishes the distinction between contributory negligence and assumed risk, and clearly it does in cases coming within the statute. Neither this case nor Currie v. Missouri, K. & T. Ry. (101 Texas, 478) lend much assistance in determining the question here presented. Our conclusion, however, upon mature consideration, is, that the facts here stated as constituting the negligence of appellants come within the meaning of the Act in question, and that in instructing the jury on the issue of assumed risk it was correct to apply to such charge the provisions of the statute, and to refuse the charges requested on this issue, which ignored those provisions.

It is also contended by appellants that, under the undisputed evidence, the deceased Lewis was guilty of contributory negligence, both as an independent defense and as a part of the law of assumed risk under the statute. The view is pressed with much force, both of argument and authority, that the very facts relied upon to show negligence on the part of appellants, convict Lewis of negligence likewise.

The statute itself recognizes that there may be cases when the master may be guilty of negligence in the matter of defects and dangers, but the servant will not be, even if he have full knowledge thereof and continue in the employment where he is exposed to such danger. In this case it is simply a question whether a person of ordinary care would have so continued. It will not do, we think, to say that if the master was negligent in the matter complained of as to the makeup and operation of the train, and the servant knew that this was the customary manner of operation and was aware of the danger, it necessarily follows that no person of ordinary care would have continued in the service and exposed to the danger. This is, we understand, appellants' contention.

Negligence, whether of the one party or the other, is always a question for the jury to be judged by the standard of ordinary care, unless the undisputed evidence establish the one side or the other of the issue, in which case, as in all other issues of fact, it is the duty of the court to determine the issue. It becomes then an issue not of fact but of law. (Joske v. Irvine, 91 Texas, 574.) But on account of the standard by which the issue is to be tried, it is very seldom that it can properly be determined by the court as one of law. In the present case we are of the opinion that the evidence required the submission of the issues of contributory negligence and assumed risk to the jury, and that it was sufficient to sustain their finding.

What we have said disposes likewise of the seventh assignment of error, which complains of the refusal of the court to give to the jury special charges 4 and 5, as to the assumption of risk by Lewis of the presence of cattle on the track. The evidence showed that the track was unfenced, and that cattle running through the woods were often upon the track, and often found lying upon the track at night, as on the occasion of this accident. If Lewis knew of this, his action in continuing in the performance of his duty, in which he was engaged at the time of the accident, as to whether he assumed the risk of such danger or was guilty of negligence contributing to his death, in either case must be judged by the standard of ordinary care as applied thereto. The assignments of error presenting the contrary conclusion must be overruled.

There was no reversible error in refusing to give the charges requested by appellants, in substance, that they rested under no duty to fence their road, and that the failure to fence did not show liability in this case. No charge of negligence was predicated upon this failure. It was not an issue, and the jury could not have considered that any inference of negligence could be drawn by them from this fact. The fact, however, that cattle were frequently upon the track might very properly have been considered in determining the issue as to whether there was negligence in operating the train as it was, in the night-time, and also as to such negligence in the rate of speed at which it was run.

The evidence does not show that Lewis had any control over the speed of the train other than that, from his station at the front of the train with a lantern, his duty was to cause the train to stop or slow down when he saw any obstruction on the track. Under such a

state of facts it would have been error to have given the charge asked by appellants, that if the train was being run at an excessive rate of speed, and Lewis failed to give any signal for the purpose of slowing down the train, plaintiffs could not recover. There is no evidence that Lewis saw the cattle, or, in fact, could have seen them by the light of his lantern, until the train was upon them. There is no merit in the ninth assignment presenting this question.

There was no error in refusing special charge 15, requested by appellants. If any charge upon this point was called for, which we doubt, the charge given by the court was sufficient.

We have carefully examined the several assignments of error and the propositions thereunder, and conclude that none of them presents any ground for reversal. The judgment is therefore affirmed.

Affirmed.

Writ of error refused.

J. M. DORROH v. D. B. BAILEY ET AL.

Decided February 17, 1910.

Intervention—Interest in Attached Property.

In an action for a debt a third party has no right to intervene because he was a mortgagee or owner of property attached by plaintiff as defendant's. He had a remedy by claimant's bond. To entitle him to intervene he must have an interest in the subject matter of the litigation between plaintiff and defendant; this, such intervener did not have. Fleming v. Seeligson, 57 Texas, 531, and Johnson v. Luling Mfg. Co., 24 S. W., 996, distinguished.

Appeal from the County Court of Upshur County. Tried below before Hon. Albert Maberry.

Warren & Briggs, for appellant.

Mell & Stephens, for appellee.

WILLSON, CHIEF JUSTICE.—By his suit Dorroh, the plaintiff below, sought to recover sums aggregating $540.38, alleged to be due to him from Bailey on promissory notes made by the latter. After he had instituted his suit Dorroh procured the issuance of a writ of attachment, which, it appears from the officer's return made thereupon, was levied upon two bales of lint cotton weighing respectively 500 and 520 pounds, cotton "in the field" estimated to be a quantity sufficient to make one light bale, a bay mare valued at $50, a wagon valued at $50, found in Bailey's possession, and two bales of lint cotton marked "No. 511" and "No. 512" found in the possession of one Mings. In his answer Bailey alleged that the "cotton in the field," levied upon by virtue of the writ, was ungathered at the time it was levied upon, and was exempt to him because it had been grown upon and was then upon land constituting a part of his homestead; and he further alleged that the wagon levied upon was exempt to him because he was the head of a family and owned no other wagon. Appellee W. H. Hamlett sought to intervene in the suit, and in his petition

alleged, as grounds entitling him to intervene, that Bailey was indebted to him in sums aggregating $258.70, to secure which he had, prior to the time the writ of attachment was levied, executed and delivered to him (Hamlett) a chattel mortgage on "five acres of cotton grown and cultivated by defendant on his farm during the year 1908; that the said cotton was planted, grown and matured, and was thereafter baled, and that intervener's said mortgage lien fully attached, and was, at and before the time of the levy of the attachment herein by plaintiff, a valid and subsisting and unsatisfied mortgage lien on the said cotton as described in the return of the officer levying said attachment, and was also a valid and subsisting lien, unsatisfied, on the horse described in said officer's return, which is and was the same horse described in intervener's said mortgage lien." In his petition said Hamlett further alleged that Bailey had, before the issuance and levy of the writ of attachment, sold and delivered to him (Hamlett) the two bales of cotton described in the officer's return as marked "No. 511" and "No. 512." He attached as an exhibit to his petition in intervention the mortgage referred to therein, and prayed for a judgment against Dorroh for the two bales of cotton marked "No. 511" and "No. 512," and for the value of the other property levied upon by virtue of the writ of attachment and covered by the mortgage; and for a judgment against Bailey for the unpaid part of the debt secured by the mortgage, and foreclosing same as against all the property covered by it. In a supplemental petition Dorroh excepted to Hamlett's petition in intervention on the ground that it showed no interest in Hamlett in the subject matter of the suit. The exception was overruled. In a trial amendment Dorroh alleged that, to secure one of the notes he sued upon, Bailey had executed and delivered to him a mortgage on "one 2¾-inch Espenchied wagon, brake, seat and bed." The judgment of the court on the verdict of a jury was in favor of Dorroh against Bailey for the sum sued for by the former, and foreclosing in favor of Dorroh the mortgage lien claimed by him on the wagon; in favor of Hamlett against Bailey for the sum claimed by the former to be due to him by the latter, and foreclosing in favor of Hamlett the mortgage lien claimed by him against a horse, two mules, two bales of the cotton and five-sixths interest in the "cotton in the field," levied on by virtue of the writ of attachment; in favor of Hamlett against Dorroh and the sureties on a replevy bond executed by them to obtain the possession of a portion of the property levied upon by virtue of the writ of attachment; and in favor of Bailey for one-sixth interest in the "cotton in the field." The two bales of cotton marked "No. 511" and "No. 512" were decreed to be property belonging to said Hamlett. The appeal is by Dorroh.

After stating the case as above.—We think the court erred in overruling appellant's demurrer to the petition in intervention of appellee Hamlett, on the ground that it did not appear from the allegations in said petition that said Hamlett had an interest in the subject matter of appellant's suit against appellee Bailey, to wit, the alleged indebtedness of the latter to the former. Fisher & Weis v. Bogarth, 2

App. C. C., secs. 120 and 121; Jaffray v. Meyer, 1 App. C. C., secs. 1350 and 1351; Stansell v. Fleming, 81 Texas, 298; Reddick v. Elliott, 28 S. W., 43; Whitman v. Willis, 51 Texas, 426; Meyberg v. Steagall, 51 Texas, 354; Hillebrand v. McMahan, 59 Texas, 454; Ferguson v. Herring, 49 Texas, 129. In Fisher & Weis v. Bogarth, *supra*, a distress warrant had been issued and levied upon property found in Bogarth's possession upon the rented premises. McDonnell & Co. intervened in the suit, alleging that they held a mortgage lien upon the goods, executed to them by Bogarth to secure an indebtedness due by him to them, and that their mortgage lien was prior and superior to the landlord's lien claimed by plaintiffs. It was held that the subject matter of the suit was the amount of rent claimed by plaintiffs to be due to them from Bogarth, and therefore that McDonnell & Co. were not entitled to intervene in the suit. In Jaffray v. Meyer, *supra*, Jaffray sued Meyer for a debt and had a writ of attachment levied upon merchandise as the property of Meyer. One Cheek intervened, claiming the merchandise by virtue of a deed of assignment executed to him as assignee by Meyer for the benefit of his creditors, which he (Cheek) had accepted, and under which he claimed to have been in possession of the goods when same were levied upon. In discussing the right of Cheek to intervene, after calling attention to the fact that the interest authorizing an intervention by a stranger to the record in a pending suit must be an interest in the subject matter of such suit, the court said: "The seeming confusion which exists in regard to the right of intervention results not so much from the fact that some ancillary writ has been issued in a pending cause as it does from the fact that the character of interest necessary to authorize an intervention is not properly considered. The subject matter of this litigation was the recovery by appellants against Meyer for their debt. The intervener does not pretend to have any interest in the debt that could be affected by the judgment that might be rendered therein. He asserts no claim to it as against either party, nor any defense whatever against a recovery by appellants. Speaking from the record, this suit did not have for its object, in whole or in part, the foreclosure of any lien upon the specific property subsequently levied upon by the sheriff. The writ of attachment was not levied against any particular property of the defendant Meyer. At the time the writ was issued Cheek had no interest in the subject matter of the suit; he could not have recovered, in whole or in part, the relief sought by appellants, neither could he, as defendant, have defeated the appellants in obtaining any part of that relief. The question as to the right to the particular property levied on was incidentally brought into the suit by a contingency occurring after its commencement. As to whether that or any other property would become involved in the litigation, even incidentally, could, at the time the suit was brought, have been but a matter of surmise or speculation depending upon the action of the sheriff in levying the attachment. The appellee Cheek fails in his plea in intervention to show such an interest in the subject matter of the suit as would authorize him to intervene therein." In Carter v. Carter, 36 Texas, 693, it was held that a claimant of property levied upon as the property of another person was not entitled

to intervene in the pending suit, but that his remedy was to file a claimant's affidavit and bond under the statute. Sayles' Stats., art. 5286. In Ryan v. Goldfrank, 58 Texas, 358, the ruling in Carter v. Carter was referred to as one which had been frequently made by the Supreme Court, and Pool v. Sanford, 52 Texas, 621, and Rodrigues v. Trevino, 54 Texas, 198, were cited as instances. The authorities referred to, we think, must be regarded as conclusive of appellee Hamlett's contention that he had a right to intervene in appellant's suit against Bailey upon either the ground that he had a mortgage lien upon the property attached, or was the owner of a part of it. They are not, we think, in conflict with either Fleming v. Seeligson, 57 Texas, 531, or Johnston v. Luling Mfg. Co., 24 S. W., 996, cited by appellee as supporting his contention. The former was a suit of trespass to try title, and certain land, which the intervener claimed to own, was the subject matter of the suit. The latter was a suit for debt and to foreclose a mortgage on property levied upon by virtue of a writ of sequestration at the plaintiff's instance, and on which the intervener also claimed a lien. The subject matter of the suit was the debt claimed and the specific lien asserted against specific property seized by virtue of the writ of sequestration.

The conclusion reached renders it unnecessary to consider other assignments. The judgment will be reversed and the cause will be remanded with instructions to the court below to dismiss appellee Hamlett's petition in intervention, and to try the case anew on the issues between appellant and appellee Bailey.

Reversed and remanded.

MRS. FANNIE RAMSEAUR V. S. E. BALL ET AL.

Decided February 17, 1910.

1.—Boundaries—Controlling Calls.

The principles giving controlling effect to certain calls in ambiguous description of land discussed.

2.—Same—Beginning Point—Case Stated.

The beginning corner is of no greater dignity than others in the description of land. Where a deed called for marked bearing trees at the beginning corner on the East line of the original survey, and for the Southeast corner, and for a given distance between, the beginning corner should be placed at the distance North from the Southeast corner so called for, unless a point further North on the East line could be identified by the bearing trees or other evidence, as the place marked and designated for beginning.

3.—Newly Discovered Evidence.

Facts considered and held not to show error in refusal of a motion for new trial on the ground of newly discovered evidence in regard to a disputed boundary line, the facts being ascertainable and the necessity for inquiry into them obvious before trial.

Appeal from the District Court of Bowie County. Tried below before Hon. P. A. Turner.

Smelser & Vaughan, for appellant.

J. B. Manning, N. L. Dalby and *F. M. Ball,* for appellee.

HODGES, ASSOCIATE JUSTICE.—This suit was instituted by the appellant in the form of an action of trespass to try title, to recover 430 acres of land located in the southern portion of the Charles Lewis survey in Bowie County. The original survey was patented to Charles Lewis in 1845, and is much larger than the tract in controversy. In 1853 Charles Lewis executed a deed to F. Smith, under whom the appellees claim, containing the following description: "Beginning at a stake on the east boundary line of my said survey, near Myrtle Springs, witness trees 2 post-oaks, marked E. L. Thence South 2090 vrs. to the S. E. corner of my said original survey, witness trees marked L. P. and C. L. Thence East (west) 1650 vrs. to my S. W. corner, witness trees marked C. L. Thence North 2090 vrs. to a stake, witness trees marked E. L. Thence East to the beginning." The principal question in issue is, whether the land in controversy is contained within the description of that instrument.

At his death Charles Lewis left a will, in which he provided for the payment of a legacy of $5,000 to Margaret Ann Stewart. Upon a failure of his executors to pay this amount Margaret Ann Stewart recovered a judgment against them, and it is claimed that the land in controversy, with other land, was levied upon and sold in 1880 by the sheriff of Bowie County under an execution issued upon that judgment. W. H. Tilson and F. M. Henry became the purchasers at that sale. Subsequently Henry acquired Tilson's interest, and then conveyed to Knox, under whom the appellant now claims. The trial court concluded, and we think his conclusion correct, that the description in the sheriff's deed to Tilson and Henry, was so vague and uncertain as to make it absolutely void as to this land. The evidence, however, shows that P. S. Ramseaur, the deceased husband of the appellant, soon after he acquired the land, went into actual possession by enclosing it with a fence and using it for the purpose of pasturing stock; and appellant relies upon this prior possession in the event it should be held that the sheriff's deed under which she claims is not sufficient in point of description. It is virtually conceded that if the field notes contained in the deed from Lewis to Smith embrace the land in controversy, then this judgment should be affirmed.

Upon the face of the deed there is no ambiguity in the field notes, and none is shown when we undertake to apply them to the land claimed, except as to the length of the east and west lines. From a plat offered in evidence it is shown that the apparently recognized beginning corner referred to is 3477 varas distant from the southeast corner of the survey, instead of 2090 varas as called for in the deed. The testimony fails, however, to show the existence of the bearing trees called for, or any other fact that would permanently locate this northeast corner (the beginning) at the place claimed, except its recognition by the parties in interest. There seems to be no doubt as to the proper location of the southeast and southwest corners of the Lewis survey. At none of the corners are the witness trees called for in the deed shown to be in existence, or to have ever been there within the knowledge of any one who testified in the case. If we lo-

cate the beginning corner where the appellant claims it to be, there is evidently a mistake in the calls for distance on the east and west lines and in the quantity of land conveyed. If we push the beginning corner 1387 varas farther south there would be no variance in the field notes and but an inconsiderable excess in the quantity of land. Appellant contends that the calls for distance should in this instance control, for the reason that the southwest corner of the Lemuel Peters survey is exactly 2090 varas south of the beginning corner of the Lewis as recognized by the parties, and that the surveyor mistook this for the southeast corner of the Lewis survey. It is agreed that this mistake is made evident not only by the discrepancies in the distance and area, but by the further fact that one of the witness trees called for at this point is designated as being marked L. P., which, she claims, must refer to Lemuel Peters. We may assume that there was a mistake either in the location of the beginning corner, or of the southeast corner of the Lewis survey, the end of the first call for distance. But which shall we say should yield to the call for distance? The beginning corner is of no higher dignity than any other corner of a survey of land. The only evidence in the record before us that can be relied upon to fix the location of this beginning corner is found in two conveyances made by Lewis in 1854, on the same day, one to F. Smith and the other to J. W. Battle. The deed to Smith begins: "Beginning at a stake, the N. E. corner of a 640-acre tract in the name of J. F. Smith, on the E. B. line of the Chas. Lewis river tract of land," etc. The deed to Battle begins: "Beginning at a stake on Chas. Lewis' E. line, 161 poles north of the N. E. corner of J. F. Smith's 640-acre tract." There is nothing in these field notes to indicate that the beginning corner (the N. E. corner) was not just 2090 varas north of the southeast corner of the Lewis survey. There was nothing to tie it to the place where the parties now contend that it is. The two post-oaks marked E. L., called for in the field notes as indicating the beginning corner, were not located by the evidence, the land at that place having been cleared of the timber. In this state of the evidence, why should not this tract of land be located 1387 varas farther south, in conformity with the field notes? The conflict between the field notes in the deed to Smith and the true description of the land as it is lies in the assumption that the northeast corner is at the point designated in the plat. It may be true that, by the general recognition of the parties extending over many years, that particular spot has been regarded as the beginning corner from which the tract of land was to be located, but such recognition might have grown out of a mistake. Even if we concede that Lewis and Smith regarded that as the northeast corner, it may still have been the result of a mistake upon their part. Unless we disregard the plain language of the deed, the land conveyed extended to the south boundary line of the Lewis survey. There is nothing to indicate the corners, and the south boundary line of the Lewis was not marked on the ground. If this be true, then, viewed from the standpoint of the appellant, we have a conflict between distance and artificial objects. That, in such cases, calls for distance must yield, is too well settled in this State to require the citation of authorities. The exceptions to

this rule seem to arise in cases where it is apparent from the face of the grant that the calls for natural and artificial objects were inserted by mistake, or were laid down by conjecture and without regard to rule. In such instances course and distance will prevail as being, under the particular circumstances, the best evidence of the actual intent of the parties. Hubert v. Bartlett, 9 Texas, 104; Booth v. Upshur, 26 Texas, 70; Johnson v. Archibald, 78 Texas, 102, 14 S. W., 266. We fail to find anything in the facts of this case to bring it within the exception.

The refusal of the court to permit the appellant to file an amended motion for a new trial is made the basis of one of the assignments of error. The case was tried before the court without a jury, and shortly after judgment was rendered in favor of the appellees the appellant filed a motion for a new trial. Action on this motion was delayed till near the close of the term, as stated by the court, at the instance of the appellant's counsel. On the day the motion was finally called for disposition, counsel for appellant desired to file an amended motion setting up the fact that they had discovered other material evidence not offered on the trial. The amendment was accompanied by the affidavits of the witnesses whose testimony was desired for use upon another trial. Upon objection made by the attorneys for appellee, the court refused to permit the filing of the amendment and overruled the original motion. The error, if any, in refusing permission to file the amendment, would not justify a reversal of the case, unless upon an inspection of the record it appeared that the trial court had abused his discretion and denied the appellant the opportunity to present a defense which would affect the result of the trial and which could not, by the exercise of proper diligence, have been presented upon the former trial. The merit of the amendment rested alone upon such consideration as should be given to matter presented as newly-discovered evidence. In his qualification to the bill of exceptions reserved, the court states that one of the witnesses whose testimony was relied upon testified upon the trial, and the other was in and about the courtroom during that time, and he is inclined to believe had been summoned as a witness in the case. The newly-discovered evidence consisted mainly of observations made by these witnesses upon going over and making another inspection or survey of the old lines of the Smith tract of land. According to their affidavits filed with the amended motion, they discovered a tree marked L. P. at the southwest corner of the Lemuel Peters survey on the east line of the Lewis, just 2090 varas south of where appellant claims the northeast corner of the Smith tract of land is located. There was also an old marked line running from that point west to the west boundary line of the Lewis survey; also a marked line a part of the way across the north end of where it is claimed the Smith land should be.

There is nothing in the record to indicate that all of this testimony could not have been obtained and used on the trial. The nature of the suit and of the deed upon which the appellees must rely was notice of the necessity for establishing all the local conditions which would tend to show a mistake in the calls for the south boundary

line of the Lewis survey. Even if the truth of the facts set up in the affidavits be admitted, they certainly were not such as to require us to hold, as a matter of law, that the judgment in this case was erroneous. On the contrary, we are disposed to think that, with all of them in evidence, the court could have rendered no other judgment in the case.

There are other assignments in the record raising questions collateral to those considered, and which we think should not affect the result, since the judgment is sustained upon the ground that the deed to F. Smith embraced the land in controversy. The judgment is accordingly affirmed.

Affirmed.

ORIENT INSURANCE COMPANY v. DORROH-KELLY MERCANTILE COMPANY.

Decided February 17, and March 25, 1910.

1.—Insurance—Contract—Inventory.

A contract of insurance upon a stock of goods avoiding the policy unless the insured shall have made within twelve months previous or shall make within thirty days after its issuance a complete itemized inventory of the stock on hand, to be preserved and furnished the insurer in case of loss, is not complied with by the making of an inventory from which the insured intentionally omitted goods to the value of from $2,000 to $4,000, amounting to one-tenth to one-fifth of the stock. A reasonable compliance with the contract is required and slight or inadvertent omissions are not material, but this is not a reasonable compliance, and authorizes a peremptory instruction in favor of the insurer.

2.—Same.

If the insured had furnished the insurer anything from which the information contracted for in the form of an inventory could be reasonably ascertained, a question as to substantial compliance with the contract might be presented, but it did not arise in the absence of such information or of an inventory such as the contract called for.

3.—Same.

The insurer must recover if at all, upon the terms of the contract, and can not, without substantial compliance therewith, recover on the basis of the stock being of the value shown by an incomplete inventory where he agreed to furnish a complete one.

Appeal from the District Court of Upshur County. Tried below before Hon. R. W. Simpson.

Crane & Crane, for appellant.

J. P. Hart and *Warren & Briggs,* for appellee.

WILLSON, CHIEF JUSTICE.—February 7, 1908, appellant issued its policy No. 149998 for $1000, and April 1, 1908, issued its policy No. 330456 for $2300, insuring appellee's stock of merchandise in Big Sandy against loss by fire. January 8, 1909, the stock of

merchandise, then valued at about $22,000, except portions thereof valued at about $2000, and insured in sums aggregating $16,000, was destroyed by fire. Appellant having disclaimed liability on the policies, appellee commenced the action resulting in a judgment in its favor for the sum of $3214.86, from which this appeal is prosecuted. Each of the policies contained, among others, stipulations usual in such contracts, commonly denominated the "iron safe clause." While the language covering those stipulations is not identically the same in each of the policies, the variance is unimportant, so far as it affects the conclusion reached by us as to the disposition to be made of the appeal. In the policy numbered 330456 the stipulations referred to are as follows: "1. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of the issuance of this policy, or this policy shall be null from such date. 2. The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory, as provided for in the first section of this clause, and also from date of last preceding inventory, if such has been taken, and during the continuance of this policy. 3. The assured will keep such books and inventories, and also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night and at all times when the building mentioned in this policy is not actually open for business; or failing in this, the assured will keep such books and inventories in some secure place not exposed to a fire which would destroy the aforesaid building, and unless such books and inventories are produced and delivered to this company for examination after loss or damage by fire to the personal property insured hereunder, this policy shall be null and void, and no suit or action shall be maintained hereon. It is further agreed that the receipt of such books and inventories and the examination of the same shall not be an admission of any liability under this policy nor a waiver of any defense to same." In its answer appellant alleged as a breach, among others, by appellee of said stipulations a failure on its part to take "an itemized inventory of its stock on hand within twelve calendar months prior to the date when said policies were issued" and a failure to take such an inventory "within thirty days thereafter." The testimony was uncontroverted that an inventory of the stock of merchandise was not taken within thirty days after the date of the issuance of either of the policies; and it was uncontroverted that the only inventory taken within twelve months prior to the date of the issuance of either of them was one taken January 29 to February 1, 1908. At that time J. M. Dorroh and J. M. Dorroh, Jr., as partners under the firm name of J. M. Dorroh & Son, owned the stock of goods and were negotiating with T. J. Kelly to sell him a one-half interest in same and in their business as merchants. The sale to Kelly was made and the business was incorporated, the Dorrohs and Kelly becoming the owners of the stock of the corporation. The inventory referred to was taken for

the information of the parties to the negotiations. The testimony was uncontroverted that as taken the inventory was not a complete one of the entire stock of merchandise. Kelly testified, and his testimony was not contradicted: "The interest that I was buying was in the stock of goods at Big Sandy and also at Pritchett. I was to get a one-half interest. We made the trade on the basis that there was a $20,000 stock on hand; but invoicing the stock in the building at Big Sandy, we got up to $18,638 and some odd cents—that is to say, we inventoried that much goods, including the furniture and fixtures, and at the time we left uninventoried about $2000 approximately of goods. I swore on a preliminary examination that we left uninventoried $3000 or $4000 and there was probably that much uninventoried. Of the amount inventoried there was $1050 furniture and fixtures. Taking that from $18,638 leaves the actual amount of stock that we inventoried as a basis of the trade as $17,588.01. This item was entered on the stock account. When we reached that point I told them that the stock was going to be of greater value than I anticipated—that I had only $6187.50 to put into the business and there was no use going further with it. After some conference with the older Dorroh and the junior Dorroh, it was agreed that we would stop taking the inventory and they would sell me one-half interest in the business for the sum of $6187.50. This sale included all the stock of goods at Big Sandy, including furniture and fixtures and some $1900 worth of stock at Pritchett, but the Pritchett goods were not included in this inventory."

On the ground, it is assumed from the contention made in this court, that the inventory referred to as a matter of law was incomplete, in that from $2000 to $4000 worth of goods constituting a part of the stock insured were intentionally omitted therefrom, appellant requested the trial court to peremptorily instruct the jury to find in its favor. The assignment presenting for review here the action of the court in refusing to so instruct the jury is the only one we have found it necessary to consider in disposing of the appeal.

It seems to be settled in this State that a stipulation in a fire insurance policy that the insured, if he has not taken a complete itemized inventory of the stock of goods covered by the policy within twelve months prior to its date, will take such an inventory within thirty days after its date, should be construed as a promissory warranty, a breach of which will avoid the policy. Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co., 8 Texas Civ. App., 227, 28 S. W., 1027; Fire Association of Philadelphia v. Calhoun, 28 Texas Civ. App., 409, 67 S. W., 153; Delaware Ins. Co. v. Monger, 74 S. W., 792; Continental Ins. Co. v. Cummings, 98 Texas, 115, 81 S. W., 705; Roberts v. Sun Mutual Ins. Co., 19 Texas Civ. App., 338, 48 S. W., 561; Fire Association of Philadelphia v. Masterson, 25 Texas Civ. App., 518, 61 S. W., 962; Allred v. Hartford Ins. Co., 37 S. W., 95.

It seems also to be settled that while such a stipulation should be so construed, no greater strictness in complying with it should be required than is required in the performance of like stipulations in other than insurance contracts. "A substantial performance of the contract would suffice, in such a case," said the Supreme Court in

Brown v. Palatine Ins. Co., 89 Texas, 590, 35 S. W., 1061, where the question was as to whether the insured had failed to comply with the stipulation that he would keep, and, in the event of a loss by fire, produce, a set of books containing a record of the business transacted by him: "That is," the court added, "the contract is to be construed as including no more than could be reasonably expected of the insured." And see Western Assurance Co. v. Kemendo, 94 Texas, 367, 60 S. W., 662; Liverpool & L. & G. Ins. Co. v. Kearney, 180 U. S., 136.

It is clear that the inventory we have referred to literally was not a "complete itemized inventory" of the stock of goods covered by the policies. Therefore the only question necessary to be determined in disposing of the assignment referred to, is: Should it be said as a matter of law that an inventory from which the assured intentionally has omitted goods aggregating in value from one-tenth to one-fifth the value of the stock insured, is not, substantially, a "complete itemized inventory" within the meaning of the stipulation in the contract? Or, stating the question another way, and giving to the word "substantial" the meaning the Supreme Court seems to have given to it in the Brown case, cited above, should it be said as a matter of law that such an inventory is not the "complete" inventory the insurer reasonably had a right to expect the insured to take and preserve as a compliance with the stipulation in the contract? We think it might be said as a matter of law that reasonably the insurer should expect that, in taking an inventory of a stock of general merchandise aggregating in value $20,000, a few articles of small value constituting a part of the stock, by oversight, mistake or inadvertence, might be omitted therefrom, and, therefore, if such an omission occurred, that he should not be heard to set it up as a breach of the contract. By showing such an omission, we think the insurer would not have made as an issue for the jury a question as to whether the contract had been substantially complied with or not. The court could say as a matter of law that the contract had been substantially performed. On the other hand, we think it ought to be said as a matter of law that the insurer had a right to expect that in taking such an inventory articles aggregating in value from one-tenth to one-fifth the value of the stock, and perhaps equaling in value the amount claimed to be due on the policies in question, would not intentionally be omitted therefrom; and, therefore, if such an omission should be shown to have occurred, that the court should say as a matter of law that the terms of the contract requiring the taking of a "complete itemized inventory" had not been complied with. It should not be said that the insurer reasonably might have expected that the insured would intentionally omit from an inventory he had bound himself to make "complete" articles of substantial value; and, certainly, it should not be said that the insurer contemplated that the insured would intentionally omit from such an inventory articles aggregating in value a sum equal, or nearly so, to the amount of the sum claimed by the assured by virtue of the contract. To say that the insurer should have expected such an intentional omission from the inventory, would be to say that

he should have expected the assured to wilfully ignore a duty imposed upon him by the contract. Instead, we think he had a right to expect that the insured would in good faith endeavor to discharge that duty. It has been expressly held, where the question was as to whether a building contract had been "substantially" performed, that "the omissions or deviations must be the result of mistake or inadvertence, and not intention." Elliott v. Caldwell, 43 Minn., 357, 9 L. R. A., 52. In Western Assurance Co. v. Kemendo, 94 Texas, 367, 60 S. W., 662, the Supreme Court of this State declared the object in requiring the inventory as stipulated for not to be "to ascertain the gross value of the property insured, but to ascertain the different articles which went to make up the stock, in order that the insurance company might test the correctness of the claim in two respects: (1) whether the articles of which the stock was composed all belonged to the classes of property covered by the policy; and (2) whether the valuation attached to the different items, and which went to make up the total sum expressed, was reasonable." After so stating the object of such a stipulation as the one in question here, the court added: "The failure to produce an inventory, or that which is equivalent in these particulars, could not be held to be a substantial compliance with the requirements of the policy." We understand that court to have meant by the statement we have just quoted, that the failure of the assured to produce an inventory showing the articles composing the stock and the value placed on same, and his failure to produce other data furnishing such information, would constitute a breach of the stipulation in the policy. If such is the effect of the holding, then certainly the record before us shows such a breach. For, admittedly, articles aggregating in value from $2000 to $4000 were not included in the inventory produced; and other data showing the omitted articles and their values was not produced. As to the portion of the stock intentionally omitted from the inventory produced by appellees, we think the further statement made by the Supreme Court in the Kemendo case to which we have referred, is applicable: "If the assured," said that court, "had furnished anything from which the information contracted for could be with reasonable certainty ascertained, then the question of substantial compliance would be before the court; but when there is no compliance whatever, there can be no question of a substantial compliance with such requirements." And see Roberts, Willis & Taylor Co. v. Sun Mutual Ins. Co., 19 Texas Civ. App., 388, 48 S. W., 559; Fire Association of Philadelphia v. Calhoun, 28 Texas Civ. App., 409, 67 S. W., 153; American F. Ins. Co. v. Centor, 33 S. W., 554; Fire Association of Philadelphia v. Masterson, 25 Texas Civ. App., 518, 61 S. W., 962; Scottish U. & N. Ins. Co. v. Weeks, 55 Texas Civ. App., 263, 118 S. W., 1086.

We do not think the contention made by appellees that in any event they were entitled to recover on the policies on the basis of the stock being of the value shown by the inventory produced should be sustained. They were entitled to recover, if at all, only upon the terms of the contract. Not having themselves complied, substantially, or otherwise, with its terms in the particular specified, the policies

became, at the option of the insurers, as said policies declared should be the consequence of such a noncompliance, null and void. It may be that the conclusion reached results in hardship to appellees, but, as was said by the Supreme Court in the Kemendo case referred to above, "it is not the province of the court to adjust its construction and enforcement of a contract to the results which may be produced upon the parties, but it is better that those who make hard contracts shall suffer the result than that the law shall be so warped and distorted as to disturb the business of the country, and to render the power of contracting uncertain and unreliable."

The judgment will be reversed and a judgment will be here rendered in favor of appellant.

Reversed and rendered.

ON MOTION FOR REHEARING.

Being unconvinced that the disposition made of the appeal was an erroneous one, we overrule appellees' motion for a rehearing; but in compliance with their request that we do so, find as facts: 1. That an inventory was taken by appellee of the stock of goods on January 1, 1909, and that it appeared from the inventory then taken that the stock was worth $23,862.99. 2. That during the period intervening between February 1, 1908, when the inventory referred to in the opinion was completed, and the date of the fire, appellee kept and produced with said inventory taken January 1, 1909, for examination by appellant after the fire a set of books, consisting of a journal and ledger, showing the purchases and sales made by them. 3. That said books and inventory taken January 1, 1909, together showed that the stock of goods on hand at the date of the fire was worth $21,849.25.

Overruled.

Writ of error granted. Affirmed, Dorroh-Kelly M. Co. v. Orient Ins. Co., 104 Texas, ——.

T. J. FREEMAN, RECEIVER, v. TOM SHAW.

Decided February 17, 1910.

1.—Master and Servant—Railway—Operating Car.

Section hands distributing ties along the track by loading them upon a push car, shoving same along the track and throwing off ties therefrom at points where they were needed, were engaged in operating a car within the meaning of the Act of June 18, 1897 (Laws Twenty-Fifth Leg., Called Session, p. 14). The company was liable for injury to one of such employees by the negligence of another in causing a tie to be thrown upon him in such unloading. It was not necessary that the car be moving while the tie was being thrown off to render the injury one received in its operation.

2.—Same—Cases Distinguished.

Lakey v. Texas & P. Ry. Co., 33 Texas Civ. App., 44; Gulf, C. & S. F. Ry. Co. v. Howard, 97 Texas, 518; Gulf, C. & S. F. Ry. Co. v. Johnson, 47 Texas Civ. App., 74; Texarkana & F. L. S. Ry. Co. v. Anderson, 102 Texas 402, distinguished; and Seery v. Gulf, C. & S. F. Ry. Co., 34 Texas Civ. App., 89; Texas & P. Ry. Co. v. Webb, 31 Texas Civ. App., 498, and other cases followed.

3.—Charge—Negligence in Employing.

Requested instruction on effect of knowledge by injured employee of the negligent character of the coservant by whose fault he was injured held properly refused because embraced in the charge given.

Appeal from the District Court of Cherokee County. Tried below before Hon. James I. Perkins.

King & Morris, for appellant.—Regardless of whether appellee and his coemployes were operating a pushcar at the time of the injury, and whether Jones was negligent or not, it was error for the court to submit this issue to the jury as submitted, because Jones was a fellow servant of appellee. Granting that the pushcar was moving at the time and that they were at said time operating a pushcar, it is apparent that the operation of the car was not the proximate cause of the injury, and in no manner connected therewith, but that the cause of the injury was a separate and distinct act, independent of the operation of the car. Texarkana & Ft. S. Ry. Co. v. Anderson, 102 Texas, 402; Gulf, C. & S. F. Ry. Co. v. Johnson, 47 Texas Civ. App., 74; Gulf, C. & S. F. Ry. Co. v. Howard, 97 Texas, 518; Galveston, H. & N. Ry. Co. v. Cochran, 49 Texas Civ. App., 591; Texas & N. O. R. Co. v. Walton, 47 Texas Civ. App., 43; Indianapolis Traction Co. v. Kinney, 85 N. E., 954.

Box & Watkins, for appellee.—Since plaintiff and Jones were operating a car they were not fellow servants. Sayles' Ann. Civ. Stats., art. 4560f; Texarkana & Ft. S. Ry. Co. v. Anderson, 102 Texas, 402; St. Louis S. W. Ry. Co. v. Thornton, 46 Texas Civ. App., 649; Missouri, K. & T. Ry. Co. v. Smith, 45 Texas Civ. App., 128; Seery v. Gulf, C. & S. F. Ry. Co., 34 Texas Civ. App., 89; Texas & P. Ry. Co. v. Webb, 31 Texas Civ. App., 498; St. Louis & S. F. Ry. Co. v. Smith, 90 S. W., 926; Texas & N. O. Ry. Co. v. McCraw, 43 Texas Civ. App., 247; Texas & N. O. Ry. Co. v. Walton, 47 Texas Civ. App., 143.

Where the testimony showed that a servant was injured while working in connection with a pushcar, and was assisting in the movements of same, it was not error for the court to refuse a requested charge instructing the jury to return a verdict against the injured servant, if they believed that at the very time the injury occurred the car was standing still. Texas & N. O. R. Co. v. Walton, 47 Texas Civ. App., 143; St. Louis & S. F. Ry. Co. v. Smith, 90 S. W., 926; St. Louis S. W. Ry. Co. v. Thornton, 46 Texas Civ. App., 649.

LEVY, ASSOCIATE JUSTICE.—By his petition appellee claims that while he and the men engaged with him were distributing ties by means of a pushcar, and while they were operating said car, and while it was in motion, one of appellee's coemployes, Primus Jones, who was assisting in the operation of said car, and in distributing said ties, negligently threw and permitted to fall on appellee one of the ties from said car, causing his injury; and further, it was alleged that appellant was negligent in employing and retaining in employ-

ment of Primus Jones when said appellant knew or by ordinary care could have known that Primus Jones was incompetent, inexperienced and negligent, and that this negligence was the proximate cause of appellee's injury. Appellant answered by general denial, and that Primus Jones was a fellow servant, and the appellee's injury was occasioned by the negligence of a fellow servant, assumed risk, and contributory negligence. The trial was before a jury, and in accordance with their verdict judgment was rendered in favor of appellee.

Appellee and one Primus Jones and four others constituted a crew under their foreman, Hale, in the employ of appellant. Their duty was to take crossties from the tie yard at Matkin Hill and to distribute them over appellant's railroad track by propelling a pushcar on which the ties were transported. The ties weighed about 200 pounds each. This crew were not engaged in placing the ties in the track, but were only distributing them along the trackway. There was another crew near by whose duty is was to place the ties in the track. Appellant's crew would load twenty-five or thirty ties each time on the car, and with their hands push the car along slowly on the track, throwing off the ties at indicated places. It was a standing order of their foreman, and the practice of the men while unloading ties, to keep the car continually in motion in order to save time. The foreman would walk in front of the slow-moving car, and with an axe hack all rotten ties in the track. The crew with the car following the foreman would jerk off ties from the car at these places indicated by the marks with the foreman's axe. It was a part of the appellee's duty to push the car and assist in starting and stopping it whenever necessary, which was usually done by pulling on or pushing against the car. This car was propelled by being pushed by hand along the track. Appellee, immediately preceding the time he was injured, had "snatched," as he expressed it, a tie off the car. The end of the tie he jerked off failed to clear the track, falling slightly under the front end of the car near the rail. Appellee immediately started to stoop over to move the end of this tie away from the track, when Primus Jones, a member of the crew on the same side of the car, but behind appellee, by jumping upon the end of another tie on the car to "break the tie down," caused the end of this other tie resting on the car, while the car was moving, to slide and become overbalanced and fall upon appellee, crushing both bones in his leg. The moving of the car not only had a tendency to cause this tie to fall, but brought the end of the tie up in close proximity to appellee. As one witness says, it "brought the tie on appellee." Appellee at the time occupied a stooping position at the front end of the car. The evidence as to whether the car was in motion at the time of the injury is conflicting, but the evidence is sufficient to sustain the finding of the jury that the car was at the time of the injury in motion. At the time appellee was injured he and the men with him had pushed the car some 300 yards from the tie yard where it had been loaded, having previously on the same day distributed a number of carloads of ties in the manner stated.

The evidence is conclusive that Primus Jones was an incompetent

and unfit and careless person for the work. There is ample evidence to support the finding that appellant's foreman, who had the power of hire and discharge, knew of such incompetency and unfitness and carelessness of Primus Jones before the injury happened. There is evidence that presented an issue of fact as to whether appellee knew of the incompetency of Primus Jones. Appellee had been working in the crew only two weeks at the time of his injury, and Primus Jones had been working there about six months. The findings of the jury on all issues of the case being adverse to appellant, and their findings being supported by sufficient evidence, we have adopted such findings.

After Stating the Case.—The court charged the jury that if they found from the evidence that the appellant and the crew of which he was a member "were engaged in distributing ties over a portion of the track of said railroad, and that while plaintiff was assisting in distributing ties he and the section crew with him, including one Primus Jones, were engaged as employes of defendant in operating a pushcar, and you further believe from the evidence that while plaintiff and the said Primus Jones were engaged in operating said car, if you find they were so engaged, the said Primus Jones negligently caused or permitted to fall on plaintiff's left leg one of the ties which they were distributing, and that by reason of the negligence of said Primus Jones, if he was negligent in permitting or causing said tie to fall, you find plaintiff's left leg was injured without fault on his part, then you will find for plaintiff, and assess his damages, if any, as hereinafter directed." By its first assignment of error the appellant challenges this charge as erroneous in allowing a recovery for the negligence of Primus Jones, because Primus Jones at the time of the injury was a fellow servant of appellee's. The contention is predicated upon the proposition that, granting that the pushcar was moving at the time and that they were at said time operating a pushcar, it is apparent in the evidence that the operation of the car was not the proximate cause of the injury, and in no manner connected therewith, but the cause of the injury was a separate and distinct act independent of the operation of the car. Under the statute if appellee were injured while engaged in the work of operating the car by reason of the negligence of any other servant or employe, the fact that such persons were fellow servants with each other does not impair or destroy liability. It has been ruled that a pushcar, or handcar, as the instant one, is a car within the meaning of the statute. Perez v. San Antonio & A. P. Ry. Co., 28 Texas Civ. App., 255, 67 S. W., 137; Texas & P. Ry. Co. v. Webb, 31 Texas Civ. App., 498, 72 S. W., 1044; Seery v. Gulf, C. & S. F. Ry. Co., 34 Texas Civ. App., 89, 77 S. W., 950; Houston & T. C. Ry. Co. v. Jennings, 36 Texas Civ. App., 375, 81 S. W., 823. The phrase "while engaged in the work of operating" has been construed to mean during the time such employes may be engaged in the act of doing those things which constitute the operating of the car. Gulf, C. & S. F. Ry. Co. v. Howard, 97 Texas, 513, 80 S. W., 229. The term "operation" has been ruled in the Webb case, supra, to "com-

prehend something more than the mere running of cars, locomotives and trains of a railway company." In the case of St. Louis S. W. Ry. Co. v. Thornton, 46 Texas Civ. App., 649, 103 S. W., 437, the term was defined as including within its meaning "some work in the line of his duty directly connected with or incident to the movement and operation of a car, locomotive or train." This court in Texarkana & Ft. S. Ry. Co. v. Anderson, 111 S. W., 173, uses this language: "We do not incline to so construe this Act as to include a work not necessarily connected with or incidental to the movement and operation of the car, locomotive or train." The interpretation given the statute has made the law seem clear and easily understood. The difficulty has been in the cases in applying the law to the particular facts of the given case. In the cases of Lakey v. Texas & P. Ry. Co., 33 Texas Civ. App., 44, 75 S. W., 566; Gulf, C. & S. F. Ry. Co. v. Howard, 97 Texas, 518, 80 S. W., 229; Gulf, C. & S. F. Ry. Co. v. Johnson, 47 Texas Civ. App., 74, 103 S. W., 447; Texarkana & Ft. S. Ry. Co. v. Anderson, 102 Texas, 402, 118 S. W., 127, a recovery was denied upon the ground that the injury did not occur while operating a car. These cases are relied on by appellant. These cases are briefly reviewed because the features of the instant case make a clear distinguishment between such cases and the present one. In the Lakey case it was simply his duty to assist in taking the steel from the car and laying it in the track. The car at the time was standing still, and he had nothing to do with transporting the car from the point where it was loaded. While simply performing the duty of unloading, he was injured by the fall of the rail, due to the fault of his colaborer. In the Howard case he was not injured upon the locomotive, or in working in connection with it. In the Johnson case he was performing the duty of a section hand as such, and was injured by negligence of a colaborer in dropping the rail they were carrying to load on a pushcar which they had used only one time. In the Anderson case he was hurt, not while in the act of unloading rails from a car, but while carrying the rail from the car to put it in place upon the ground, which was strictly in the performance of his section duties, and the car had nothing to do with his injury. In the precise facts of the instant case it appears that appellee and his crew were engaged in transporting ties on a pushcar from the tie yard and distributing them along the track, and were to perform no other duty. Another crew, and not this crew, was placing them in the track. Appellee's duty was to assist in pushing and stopping the car as necessary to discharge its load at intervals along the track. By order of the foreman, the car was kept moving and the unloading was done while the car was kept moving. The car was thus operated and in motion at the time Primus Jones, a colaborer, negligently caused a tie on the car to overbalance and slide on appellee and injure him. The operating of the car, it is shown, not only had a tendency to cause the tie to fall, but brought the end of the same up toward appellee and in close proximity to him. At the time of the injury appellee had taken a tie off the moving car, and because it failed to clear the track he immediately stooped over to move the end of the same off the track, when Primus

Jones jumped on the end of another tie on the car, causing it to become overbalanced and slide on to appellee. If in the record it must be ruled as a matter of law that appellee at the time of his injury by the negligence of Primus Jones was not engaged in the work of operating the car, then it would follow that the charge complained of was error. We do not think it could be so ruled. The facts, we think, bring the case within the terms and the principle of the law. The fact is clear that at the time of his injury the appellee was engaged in working directly and immediately in connection with the car and in the performance of his duty in respect thereto. It could not be said from the record that his injuries resulted from causes disconnected with and not necessarily incident to or arising out of the operation of the car. The facts show that the moving car lent material assistance to cause the tie negligently overbalanced by Jones to fall on appellee. As one witness said, the slowly moving car "brought the tie on" appellee. The benefits of the statute are for those employes who are in the course of their employment exposed to the particular dangers incident to the use and operation of cars, and whose injuries are caused thereby. Appellee was in a situation, in the performance of his necessary duties of operating the car, which, in the evidence, rendered it "difficult to protect oneself against the negligence of others." The danger he was exposed to in such operation of the car was a hazard incident to the use and operation of the car, within the purpose of the statute. We think the facts of this case bring it within the ruling in the following cases: Seery v. Gulf, C. & S. F. Ry. Co., supra; Texas & P. Ry. Co. v. Webb, supra; St. Louis & S. F. Ry. Co. v. Smith, 90 S. W., 926; Texas & N. O. Ry. Co. v. McCraw, 43 Texas Civ. App., 247, 95 S. W., 82; Missouri, K. & T. Ry. Co. v. Smith, 45 Texas Civ. App., 128, 99 S. W., 743; St. Louis S. W. Ry. Co. v. Thornton, 46 Texas Civ. App., 649, 103 S. W., 437; Texas & N. O. Ry. Co. v. Walton, 47 Texas Civ. App., 43, 104 S. W., 415; Houston & T. C. Ry. Co. v. Jennings, supra; Lodwick L. Co. v. Mounce, 46 Texas Civ. App., 230, 102 S. W., 142. In each case the injury was caused by the negligence of a colaborer and fellow servant. Because the injury was received while doing some work necessarily incident and pertaining to the car, it was ruled that they were within the terms of the statute operating a car. The assignment is overruled.

By its second assignment appellant complains of the refusal of the court to give a special charge. The special charge was to the effect that if the appellee knew that Primus Jones was incompetent and unfit and careless in the performance of his work, and after knowing the fact engaged in the work with Primus Jones, he, as a matter of law, assumed all the risk of such on the part of Jones. There was no error, because the court in its main charge affirmatively and fully instructed the jury in this respect, and authorized a verdict in favor of appellant upon favorable finding by the jury. The court charged, "But in this connection you are instructed that if you find that plaintiff knew of the negligent character and incompetency of the said Primus Jones to perform said labor, or if you find that in the discharge of his duty plaintiff must necessarily have known of said neg-

ligence or incompetency of the said Primus Jones, if you find he was negligent and incompetent to perform said labor, you will find for defendant on this issue."

By its third assignment the appellant complains of the refusal of the court to give the following special charge: "If you believe from the evidence that the defendant exercised ordinary care in the employment and retention of Primus Jones, and that said Tom Shaw was injured while the pushcar was standing, then it is your duty, without regard to any other facts in the case, to return a verdict for the defendant." The contention of appellant is that he was entitled to have the special charge as worded given because it grouped certain evidence in the case together and was the law of the case. We do not think there was error in refusing this charge as presented. The charge as requested, without any limitation or restriction whatever, made the moving of the car at the very moment appellee was injured the test of whether he was injured in operating the car. To say as a matter of law that because a car is standing still at the moment, and not moving, it is not being operated, is too restrictive. In the Howard case, supra, the court said: "If Howard had been upon the locomotive, or had been at work in connection with it for the purpose of moving it, the case would come within the terms of the statute." The Walton case, supra, was where an engineer in charge of an engine was engaged in oiling the engine, and the fireman was filling the tank with water after the engine had been stopped; and it was there held, and approved by the Supreme Court, that they were engaged in operating the engine. The case of Smith, supra, was where a brakeman was injured while lighting a lamp in the caboose before the train was made up, and while the caboose was standing still it was hit by a collision with another train; and it was held that Smith was engaged in operating the train. In this latter case it was stated: "It is immaterial as affecting the question under consideration that the work was performed in a caboose before said caboose was attached to the train." In the case of Thornton, supra, is the language: "The view that the protection of this statute extends and can be invoked only by those employes of a railroad company who are actually engaged in the manipulation of the engine, and directing the movements of the cars, or train, is too restrictive."

The judgment was ordered affirmed.

Affirmed.

(Willson, C. J., not sitting.)

Writ of error refused.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS v. E. A. ANDERSON.

Decided February 17, 1910.

1.—Carriers of Passengers—Time to Board Train.

It is the duty of a railway to stop its train at a station long enough to afford passengers in general opportunity to board same before starting it. If special circumstances of a passenger require longer time, the company is negligent in failing to afford it only where the circumstances or facts calling for inquiry are known to those operating the train.

2.—Same—Case Stated—Charge.

A shipper of fish by express at a small station where there was no express office, having to load his fish on the express car, was injured by the starting of the train while he was attempting to board it to take passage. There was evidence making it a question of fact whether his intention to take passage thereon should have been anticipated by the train men. Held, that it was error to charge that defendant was negligent if the fact that plaintiff was a passenger could have been known to them by the exercise of a high degree of care. This required that they should ascertain his intention by inquiry irrespective of circumstances calling for such inquiry.

Appeal from the District Court of Cherokee County. Tried below before Hon. James I. Perkins.

E. B. Perkins, Marsh & McIlwaine and *J. S. McIlwaine,* for appellant.—It was error for the court to charge that if defendant's porter knew or could have known that plaintiff intended to become a passenger, defendant would be liable in the event the train was not held a sufficient length of time to enable plaintiff to embark thereon. International & G. N. R. Co. v. Anderson, 82 Texas, 516; Receivers of I. & G. N. R. Co. v. Armstrong, 4 Texas Civ. App., 146; Missouri, K. & T. Ry. Co. v. Perry, 8 Texas Civ. App., 78.

Harmon & Shook and *B. B. Perkins,* for appellee.—The evidence was sufficient to support a finding of negligence. The charge was not on the weight of the evidence, and was not prejudicial to the appellant. Missouri, K. & T. Ry. Co. v. Miller, 15 Texas Civ. App., 428; Texas Midland Ry. Co. v. Ellison, 39 Texas Civ. App., 172; Atchison, T. & S. F. Ry. Co. v. Worley, 25 S. W., 478; Gulf, C. & S. F. Ry. Co. v. Butcher, 83 Texas, 315; St. Louis S. W. Ry. Co. v. Byers, 70 S. W., 559; Missouri, K. & T. Ry. Co. v. Byrd, 40 Texas Civ. App., 315; Lewis v. Houston Electric Co., 39 Texas Civ. App., 625; Galveston, H. & H. Ry. Co. v. Cooper, 70 Texas, 67; Galveston, H. & S. A. Ry. Co. v. Cooper, 2 Texas Civ. App., 45; Johnson v. Texas Central Ry. Co., 42 Texas Civ. App., 604; International & G. N. R. Co. v. Anchonda, 33 Texas Civ. App., 24; Gulf, C. & S. F. Ry. Co. v. Williams, 70 Texas, 159; Gulf, C. & S. F. Ry. Co. v. Powers, 4 Texas Civ. App., 228; Texas Central Ry. Co. v. Johnson, 51 Texas Civ. App., 126; San Antonio & A. P. R. Co. v. Turney, 33 Texas Civ. App., 626; Texas & P. Ry. Co. v. Mayfield, 23 Texas Civ. App., 415; Texas Midland Ry. Co. v. Brown, 58 S. W., 44; St. John v. Gulf, C. & S. F. Ry. Co., 80 S. W., 235; San Antonio Trac. Co. v. Levyson, 52 Texas Civ. App., 122; St. Louis S. W. Ry. Co. v. Humphreys, 25 Texas Civ. App., 401; Texas Midland Ry. Co. v. Terry, 27 Texas Civ. App., 341.

HODGES, ASSOCIATE JUSTICE.—This appeal is from a judgment in favor of the appellee against the appellant for $500 for personal injuries received while the appellee was attempting to board the appellant's train at Forest. The testimony shows that Forest was a small station on appellant's line, and that the appellee and his brother, B. B. Anderson, were engaged in shipping fish from that

place to other points. The express company kept no office at Forest, and parties desiring to ship articles by express were required to deliver them to the agents in the car. On the day the appellee was injured he and his brother had ten or twelve sacks of fish placed at the depot, at the usual stopping place of the train, ready to be loaded into the express car; part of them destined to Rusk, and part to Jacksonville. When the train stopped they proceeded to load their sacks of fish into the car. Both of them had purchased tickets, and were expecting to go on the same train, one to Jacksonville and the other to Rusk. According to the testimony of the appellee and his brother, just as they were lifting the last sack of fish into the car the train started. B. B. Anderson got into the express car, and the appellee undertook to board the train at the steps of the coach used for white people. The train was in motion as he was climbing up the steps, and gave a jar, or jerk, which does not seem to have been unusual, but was sufficient to cause the injuries of which he complains. The character and extent of his injuries not being involved in this appeal, it is not necessary to notice them further.

The negligence relied on in the petition was, the failure of the operatives to stop the train long enough to permit the appellee to get on board in safety. The testimony makes it reasonably certain that upon its arrival at Forest the train was stopped long enough to permit passengers under ordinary circumstances to get on board, and long enough for the appellee to have gotten on before the train started had he not undertaken to load his fish before attempting to do so. It is equally clear that he was not given sufficient time to get on before the train started after having done this. Among other assignments, there is one challenging the sufficiency of the evidence to show the negligence alleged and relied on for a recovery. It is not claimed that the trainmen did not stop long enough to permit passengers under ordinary conditions to board the train, or to permit the appellee to get on board had he not undertaken to load his freight into the express car before so doing. It is the general duty of railroad companies to stop their passenger trains at stations a length of time reasonably sufficient to allow all parties intending to take passage, and who present themselves at the proper place, to board the cars in safety. It is also the correlative duty of those intending to take passage to present themselves at the proper place for getting on the trains and exercise reasonable expedition in so doing after the train stops.

There can be no actionable negligence except where there is a failure to perform some legal or contractual duty. The negligence in this instance, if there was any, must rest upon the assumption that under the particular circumstances the appellant's servants in charge of the train owed the appellee the duty to allow him a reasonable time to board the train after having loaded his freight into the express car. The circumstances relied on to establish this duty depends upon the testimony showing the existence and extent of a custom prevailing at that station with reference to shippers of fish. This tends to show that parties shipping fish by express from Forest did their own loading and then accompanied the shipment by taking

passage on the same train; that the trainmen knew of and acquiesced in this proceeding so far as to allow such intended passengers time in which to first do their loading and then get aboard. Appellee and his brother had made several shipments prior to this date, and, according to their testimony, they always went on the same trains with their fish, and boarded the trains after having done the loading. The conductor admitted that there was a general custom such as we have referred to, and further admitted that the Andersons had made previous shipments and had accompanied them on the same trains; but he also stated that it was usual for the man who accompanied the shipment to get into the baggage car and go through it into the passenger coach. It must be borne in mind that the railroad company was in no way responsible for the failure to have an express office at Forest and to provide someone besides the shipper to load the freight into the express car. The express company is itself a common carrier, and is alone responsible for those conditions.

The prevalence of the custom mentioned, together with the length of time it is shown to have existed, disclosed a condition from which the jury might infer that this class of shippers who intended to become passengers were impliedly invited to avail themselves of this indulgence, or at least given to understand that they might first load their freight and that the train would be held for them. If this inference could reasonably be entertained, it then became a question for the jury to say whether under all the circumstances the starting of the train before the appellee could get on was negligence. The court charged the jury as follows: "Now, if you believe and find from the evidence that plaintiff was a passenger and that such fact was within the knowledge of the defendant's conductor or porter, or that such fact would have become known to them or either of them by the exercise of a high degree of care, and you further believe that the defendant failed to hold its train a reasonably sufficient length of time under the circumstances to enable plaintiff to board same in safety, and that defendant was thereby guilty of negligence, as same has been defined to you." While the general duty of holding trains at stations a reasonably sufficient time to allow passengers to get on in safety must be observed without regard to a knowledge on the part of the trainmen as to who may be intending to take passage, we do not think that rule should apply in favor of one who depends upon a special indulgence extended to him or his class, either expressly or by custom. In such cases the passenger should disclose his purpose, or his situation should be such as to reveal it without imposing upon the railway employes the burden of making inquiry to ascertain that purpose. Under the facts of this case this instruction practically charged the conductor and porter with the knowledge that appellee intended to get on that train. For but little effort was required for one or both to ask the appellee concerning his intentions. Both the conductor and porter disclaim any such knowledge, and, if their version is accepted, they had no reason to believe appellee intended to take passage. They testified that while it was the custom for one man to accompany such shipments, it was not usual for two of them to do so; that the one who did so generally

got in the express car, and that on this occasion B. B. Anderson was given time to do this before the train was started. Appellee and his brother testified that the express agent was informed of their intention to both accompany the shipment, and that this was done while the porter was near enough to have heard it. The express agent denied this statement, and the porter denied hearing it. Under one view of the testimony the trainmen were excusable for not waiting for appellee to board the train, while under the other they may not have been.

For the error in giving the charge referred to the judgment is reversed and the cause remanded.

Reversed and remanded.

TEXAS & NEW ORLEANS RAILROAD COMPANY v. ALFRED BUCH, BY NEXT FRIEND.

Decided February 18, 1910.

1.—Master and Servant—Authority of Brakeman—Charge.

In a suit by a minor against a railroad company for damages for personal injuries caused by being forced by a brakeman to jump or fall from the ladder on the side of a freight car to which plaintiff was clinging, whereby plaintiff's feet were so crushed as to require amputation, charge of the court considered and held not subject to the objections (1) that it failed to require the jury to find, as a condition of plaintiff's right to recover, that the brakeman whose conduct caused the plaintiff to jump from the train was acting in the line of his duty; (2) that it assumed that the brakeman, if he in fact ejected the plaintiff from the train, did so in the line of his duty to defendant; (3) that the evidence did not raise the issue of whether said brakeman was authorized to expel the plaintiff; and (4) that it ignored the issue of contributory negligence plead by defendant.

2.—Same—Rule by Master—Nonenforcement.

The nonenforcement by the master of a rule of conduct for his servants will justify a finding that the rule had been abrogated.

3.—Damages—Personal Injuries—Verdict not Excessive.

A verdict for $9,500 in favor of a boy ten years old for the loss of both feet is not excessive.

Error from the District Court of Harris County. Tried below before Hon. W. P. Hamblen.

Baker, Botts, Parker & Garwood and *A. L. Jackson,* for plaintiff in error.

Lovejoy & Parker, for defendant in error.

PLEASANTS, CHIEF JUSTICE.—This suit was brought by Ed. Buch, as next friend of his minor son, Alfred Buch, to recover damages for said minor for personal injuries alleged to have been caused him by the negligence of the Texas & New Orleans Railroad Company. The cause of action is alleged in plaintiff's petition as follows:

"That on or about the 6th day of July, 1903, and long prior

thereto, it had been the habit, usage and custom of the defendant railroad company to carry small boys on its cars and engines to and from what is known as the creosote works, east of the city of Houston; that on said date, in accordance with such alleged custom, Alfred Buch and other boys had been riding back and forth on one of defendant's freight trains; that theretofore the defendant's employes had permitted the plaintiff and other boys to ride on its cars without protest, but that on this occasion, while Alfred Buch was on one of the cars, he was run off by one of defendant's switchmen or brakemen thereunto duly authorized, and as a result was caused to fall from the train while in motion and was run over and injured in such a manner as to require the amputation of parts of both of his feet, from which he suffered great physical pain and mental anguish, and had sustained permanent injury and impairment of his ability to work after he should reach the age of twenty-one years; that his injuries were directly and proximately caused and occasioned by the negligence and carelessness of the defendant, its servants, agents and employes, in that they negligently and carelessly, with force and arms, and by cursing, abusing and threatening him with violence, and by putting him in great fear, compelled plaintiff to jump off of said train, as aforesaid, and while the said other train was passing, or about passing, the same, and with full knowledge of the presence of said train and of the danger to which plaintiff was exposed of being run over by the wheels of the train to which he was clinging, and the wheels of the train then and there about to pass or passing; and that plaintiff was ignorant of the approach or passing of said train when he jumped from the one to which he was clinging, as aforesaid; that the plaintiff was a child, ten years of age, of immature judgment and discretion." Plaintiff prayed for judgment in the sum of $30,000.

The defendant answered by a general demurrer and general denial, and by special plea charging that plaintiff was a trespasser upon defendant's cars and premises at the time he was injured and was getting on and off the cars and train while the same was in motion, and that such conduct was negligence on plaintiff's part which directly contributed to his injury and relieved defendant from liability therefor. It is further specially denied by said answer that Alfred Buch on the occasion of his injury was upon the cars of defendant with its consent or by its express or implied invitation, or was ejected therefrom by the defendant or by any person authorized by the defendant to remove him from said cars or train.

The trial in the court below resulted in a verdict and judgment in favor of plaintiff in the sum of $9,500.

The undisputed evidence sustains defendant's plea that Alfred Buch at the time of his injury was a trespasser upon defendant's cars. He had neither an express nor implied invitation to go upon said cars. The boy testified, in substance, that he got on the moving train for the purpose of riding home, and that while his feet were on the lower rung of the ladder on the side of the car on which he was riding with his hands grasping an upper rung, a switchman or

brakeman who was on the top of the car ordered him to get off and cursed and abused him, and when he refused to leave the car the switchman started down the ladder toward him, still cursing him and ordering him off, and fearing that the switchman would tread on and mash his fingers he jumped from the car and was caught and run over by a train passing on another track. This testimony was corroborated by the testimony of a sister of plaintiff who saw the switchman start down the ladder and heard him abusing the plaintiff. At the time of his injury Alfred Buch was about ten years of age and was a boy of the average intelligence of those of his age.

This testimony as to how the injury occurred was contradicted by the testimony of members of the crew in charge of the train, but the jury were justified in believing it to be true and were authorized to find that the direct and proximate cause of plaintiff's injuries was the wrongful act of the switchman in forcing him to jump from the moving train. The undisputed evidence shows that when he jumped from this train he fell under a passenger train which was passing in an opposite direction upon a track within a few feet of the track on which the train from which plaintiff jumped was moving, and a large portion of both of his feet were cut off, or so badly injured as to require amputation.

The train upon which the plaintiff was riding was in charge of a switching crew and was being switched through defendant's yards to what is known as the creosote works in the city of Houston. The crew, besides the engineer and fireman, consisted of a foreman and two or three brakemen.

In support of its plea that the brakeman on defendant's train had no authority to eject trespassers therefrom, defendant introduced the following rule which it had duly adopted and published:

"Conductors are clothed with exclusive authority to eject persons from a train, either passenger or freight; they may call upon brakemen or other trainmen to assist them, but such brakemen or other trainmen have no authority to eject anyone, either passenger or trespasser, unless under the immediate directions and instructions of the conductor, the conductor being present, and under no circumstances must anyone be ejected or forced to leave the train while it is in motion."

It was also shown that the authority of the foreman of a switching crew was similar to that of a conductor of a freight or passenger train.

To avoid the effect of this rule plaintiff introduced the testimony of several of defendant's employes to the effect that it was the general custom of the brakemen of switching crews in defendant's yards to eject trespassers from trains being handled by such crews. There was no attempt on the part of the defendant to rebut the inference arising from this testimony, that if the rule as to conductors was intended to apply to foreman of switching crews it was habitually disregarded with the knowledge of the defendant and no attempt was made on defendant's part to enforce it.

This is the second appeal in this case, the opinions of the Court of Civil Appeals for the Fourth District and of the Supreme Court

on the former appeals are reported respectively in 102 S. W., 124, and 101 Texas, 200.

Except those hereinafter discussed all of the questions presented upon this appeal were raised on the former appeal and were decided adversely to plaintiff in error. The Supreme Court, in reversing the judgment of the Court of Appeals and remanding the cause because of an error in the charge which does not appear in the charge given upon the trial from which this appeal is prosecuted, expressly approves the conclusions of the Court of Appeals upon all of the remaining questions presented on that appeal.

These opinions upon the former appeals are conclusive of the questions presented by the first, second, third, fifth and eighth assignments of error presented on this appeal, and each of said assignments is overruled.

The fourth assignment complains of the following paragraph of the charge:

"If you believe from a preponderance of the evidence that the plaintiff, Alfred Buch, was riding upon the defendant's cars and hanging onto a ladder at the side of the said car and, whilst the same was in motion, the switchman of the defendant used violent and threatening language and conduct to such an extent that he put the said plaintiff in fear of bodily injury, and through such fear the said Alfred Buch let go of the rounds of the said ladder and fell from the said car, or attempted to jump from the said car, and was injured in the manner set forth in the plaintiff's petition by having his feet crushed and mangled by the wheels of either train, as alleged in the petition in this case; and if you believe from the evidence that the said switchman was authorized by the defendant, the Texas & New Orleans Railroad Company, to perform the duties that he did perform, and to expel trespassers on the said car from riding thereon; and you believe from the evidence that the act of the said switchman was the proximate cause of the injury to the plaintiff, Alfred Buch; and you believe a man of ordinary prudence would not have caused the plaintiff to leave the car at the time and place and under the circumstances he did, if you find he did that, then you will find for the plaintiff, and assess his damages as hereinafter directed unless you find for the defendant under the following portions of this charge."

It is contended that this charge is erroneous, first, because it fails to require, as a condition of plaintiff's right to recover, a finding by the jury that the brakeman whose conduct and language caused plaintiff to jump from the train was acting in the line of his duty and with the purpose of ejecting plaintiff from said train; second, because it assumes that the brakeman, if he in fact ejected plaintiff from the train, did so in the line of his duty to the defendant; third, because the evidence did not raise the issue of whether said brakeman was authorized to expel plaintiff from the train, and therefore such issue should not have been submitted to the jury; and fourth, because it ignores the issue of contributory negligence pleaded by the defendant.

There is no merit to any of these objections to the charge. If the plaintiff's testimony as to the brakeman's conduct was believed by

the jury, there could be no question that he intended by his language and acts to force plaintiff to leave the train, and the issue of whether he so intended is not raised by the evidence. The charge does not assume that the brakeman was acting in the line of his duty and authority when he ejected plaintiff from the train, but submits that issue to the jury, and we think the evidence is amply sufficient to sustain the finding that the brakeman was authorized to eject trespassers from the train. The court having instructed the jury that plaintiff was a trespasser upon defendant's train, the issue of contributory negligence was concluded in defendant's favor, and it can not complain that such issue was not submitted to the jury.

There was no error in refusing special charge No. 12 requested by the defendant, the refusal of which is complained of by the sixth assignment of error. The main charge and special charge No. 9, given at the request of defendant, properly submits the issue sought to be submitted by the refused charge.

The seventh assignment complains of the charge of the court in submitting the issue of whether it was the habit and practice of the brakemen in defendant's yards to eject trespassers from trains, on the ground that such issue is not raised by the pleadings nor by the evidence. Plaintiff was not required to plead such custom in answer to defendant's plea denying the authority of the brakemen. As we have before said, the evidence shows that it was the general custom and practice for brakemen of switching crews in defendant's yards to eject trespassers from trains being handled by such crews, and the jury were authorized from the evidence to find that defendant knew of such custom and acquiesced therein; and if the rule proven by the defendant was ever intended to apply to switching crews (and it may well be doubted whether the evidence is sufficient to sustain the finding that it was so intended), the jury were justified in concluding that defendant by nonenforcement had abrogated such rule in so far as it applied to switching crews. The assignment is without merit.

The ninth assignment can not be sustained. There being no evidence in support of the allegations of the petition that defendant's employes were in the habit of allowing boys to ride on trains being switched to and from the creosote works, and the court having instructed the jury that the plaintiff was a trespasser upon defendant's train, it was unnecessary to further instruct them to disregard said allegation.

The tenth assignment complains of the verdict as excessive. The evidence shows that plaintiff was about ten years of age at the time of his injury. One of his feet was cut off at the instep, and at least one-half of the other foot below the instep, including the big toe, is also gone. Notwithstanding these injuries, he walks and runs with apparently little difficulty, but the evidence shows that he will never be as active as he would have been, and will never be able to stand on his feet and do the work of an able-bodied man; that such walking will always tire him, and the front portion of his feet being gone he will always have a tendency to fall forward when walking.

It was also shown that he suffered greatly from his injuries for several months. Upon this evidence we can not say that the verdict is so large as to indicate passion or prejudice or any motive on the part of the jury, other than a desire to give fair compensation for the damages sustained.

We are of opinion that the judgment of the court below should be affirmed and it has been so ordered.

ON MOTION FOR REHEARING.

In the motion for rehearing filed by appellant our attention is called to several inaccurate statements of fact in our opinion heretofore filed in this cause.

The statement in the opinion that plaintiff's testimony was corroborated by the testimony of his sister "who saw the switchman start down the ladder and heard him abusing plaintiff," is not accurate. The sister did not state that she heard the switchman abuse the plaintiff. Her statement is that she saw the switchman go down the ladder upon which her brother was riding and "heard him say something but could not understand what he was saying."

The following statement in the opinion is also inaccurate: "The undisputed evidence shows that when he (plaintiff) jumped from the train he fell under a passenger train which was passing in an opposite direction upon a track within a few feet of the track on which the train from which plaintiff jumped was moving, and a large portion of both of his feet were cut off, or so badly injured as to require amputation."

The undisputed evidence does not show that plaintiff jumped or was forced from the train by the switchman, nor that his feet were caught under the wheels of a train passing upon another track. There was evidence to the effect that the motion or jerk of the train caused plaintiff to lose his grasp of the ladder and that he fell under and was injured by the train on which he was riding. The use of the word "undisputed" in the paragraph of the opinion above quoted is only accurate when applied to the evidence as to the nature and extent of appellee's injuries. No question is made on this appeal as to the sufficiency of the evidence to sustain the finding that plaintiff was made to leave the train by the switchman and that in getting off he fell under the wheels of a passing passenger train, and our error in stating that the evidence upon these issues was undisputed is not material.

The statement in the opinion that the train "was being switched through appellant's yards to what is known as the creosote works in the city of Houston" is inaccurate in that the record does not show that it was switched through appellant's yards, and the creosote works are three or four miles from the yards and not within the city limits. The only material fact included in this finding is that the train was in charge of a switching crew and its movement was for switching purposes, and these facts are undisputed.

The only testimony as to the custom of brakemen or switching crews in defendant's yards to eject passengers from trains being

handled by such crews, was that of the witness Tom Scanlan, who had been a switchman, or foreman of switching crews, in said yards for five years preceding the plaintiff's injury, and who testified that, "Anyone in the crew would put trespassers off; that has been the custom all the time I have been there, and I know what the practice is over there;" and the witness Morrow, who was also a switchman in said yards at and before the time of plaintiff's injury, and who testified: "It has been a practice of mine all my life when I see boys jumping or climbing around cars to chase them away for humanity's sake, if for nothing else. The company did not permit boys to ride on the cars and they expected us to keep them off."

The motion for rehearing has been duly considered, and we see no reason for changing our former opinion affirming the judgment of the court below. Overruled.

Affirmed.

Writ of error refused.

CARTER-KELLY LUMBER COMPANY v. COUNTY OF ANGELINA.

Decided February 19, 1910.

1.—County School Land—Illegal Sale—Ratification.

A Commissioners' Court made an order appointing and directing the county judge "to sell and to make good and sufficient title to the purchaser or purchasers of all or any portion of said land (the county school land) or timber," and providing that the timber, if it should be sold separately from the land, "should be sold for not less than the regular customary price for same, and the purchase price of said timber only shall be paid in cash." Acting under this order the county judge sold the timber growing upon the land, receiving a cash consideration therefor which was paid into the permanent school fund of the county and afterwards, by order of the Commissioners' Court, was invested in interest bearing bonds, the interest upon which was annually collected by the county and used for the benefit of its public schools. A few days after the sale was consummated the county judge duly reported the same to the Commissioners' Court then in regular session, and a majority of the court approved and confirmed the sale, but no order of approval or confirmation was entered in the minutes of the court. Held (1) the sale of the timber was illegal only in the manner in which it was made; (2) the attempted sale by the county judge as agent for the county was an act which the Commissioners' Court could ratify; (3) that by the acceptance and use of the money and the approval of the sale, the said court ratified the same; and (4) the failure to enter the order of approval in the minutes of the court did not prevent the action of the court from having the effect of a ratification.

2.—Same—Cases Followed.

Logan v. Stephens County, 98 Texas, 283; Gallup v. Liberty County, 57 Texas Civ. App., 175; Ewing v. Duncan, 81 Texas, 230, and Waggoner v. Wise County, 17 Texas Civ. App., 220, followed.

Appeal from the District Court of Angelina County. Tried below before the Hon. James I. Perkins.

Mantooth & Collins, for appellants.—The court erred in instructing a verdict for the plaintiff: Constitution of Texas, art. V, sec. 18, and art. VII, sec. 6; Rev. Stats. of Texas, arts. 794, 1550 and 4271.

If the order of the Commissioners' Court of November 28, 1900, was not within the power of the court and in all respects valid, the sale and conveyance made thereunder by J. T. Maroney, acting for and on behalf of Angelina County, to J. D. Ford, has been ratified and confirmed by said county and the Commissioners' Court thereof and is in all respects valid and binding on said county. Gallup v. Liberty County, 57 Texas Civ. App., 175; Boydston v. Rockwall County, 86 Texas, 234, 237, 238; Matagorda County v. Casey, 49 Texas Civ. App., 35; Clark and Skyles on the Law of Agency, paragraphs 98, 115, 119, 121, 140; Dillon on Municipal Corporations, paragraphs 463, 547, 548; Mechem on Agency, paragraphs 148, 149, 118; Smith on Municipal Corporations, paragraphs 258, 259, 729; Smith v. Cantrell, 50 S. W., 1081; Merchants Natl. Bank v. McAnulty, 31 S. W., 1097; City of San Antonio v. San Antonio St. Ry. Co., 22 Texas Civ. App., 153; 28 Am. & Eng. Enc. Law (2d ed.), p. 990, notes and cases cited; 16 Cyc., 784, 787, and cases cited; Singleton v. Scott, 11 Iowa, 589; Newton v. Bronson, 13 N. Y., 594; Ellis v. Ellis, 5 Texas Civ. App., 49; Williams v. Meyer, 64 S. W., 66.

Accepting and retaining the benefits arising from a conveyance by which one was not bound or which was voidable as to him, with knowledge of the facts by which the money was received, is a ratification of such conveyance. This applies as well to municipal corporations and trustees as to any class of persons. Same authorities.

Sam H. Townsend, County Attorney, and *W. H. Townsend, Jr.*, for appellee.—The Commissioners' Court of Angelina County had no authority under the Constitution and laws of the State of Texas to delegate to J. T. Maroney, agent, authority to sell the growing pine timber upon Angelina County's school lands for such a price, "at not less than the regular customary market price" for same, as shown by the order of said court dated November 29, 1900, for the reason that the said order of the court attempted to delegate to the said J. T. Maroney, agent, "discretionary powers" as to the fixing of the "price" for which the said timber was to be sold, an act which the Commissioners' Court had not authority to make, and therefore void ab initio, and that the attempted sale of the pine timber on said land to J. D. Ford by J. T. Maroney by virtue of said order is void ab initio and passed no title to J. D. Ford to the timber. Constitution of Texas, 1876, art. VII, sec. 6; Board of Trustees v. Webb County, 64 S. W., 486; Logan v. Stephens County, 98 Texas, 283; Fuller v. O'Neil, 69 Texas, 349; Cassin v. LaSalle County, 1 Texas Civ. App., 127; Pulliam v. Runnels County, 79 Texas, 363; Dallas County v. Club Land & Cattle Co., 95 Texas, 200; Tomlinson v. Hopkins County, 57 Texas, 572; Delta County v. Blackburn, 100 Texas, 51; Blackburn v. Delta County, 48 Texas Civ. App., 370; Taber v. Dallas County, 101 Texas, 241; Logan v. Stephens County, 81 S. W., 109; Clay County Land & Cattle Co. v. Wood, 71 Texas, 460; Graham v. King, 50 Mo., 22; Bales v. Perry, 51 Mo., 451; Powell v. Tuttle, 3 N. Y., 397; Perry on Trusts, 2d ed., secs. 402,

499, 602n, 602x, 780, 799; Jackson County v. Brush, 77 Ill., 59; State v. Shaw, 64 Me., 263; 7 Am. & Eng. Ency. Law, 2d ed., 988.

The order of the Commissioners' Court of Angelina County, dated November 28, 1900, attempting to delegate to J. T. Maroney, agent, "discretionary powers" to fix the "regular customary market price" of the pine timber growing upon Angelina County's school lands, and his (Maroney's) act of discretion exercised by virtue of said order in fixing such price of said timber at $600, and the attempted conveyance of such timber by him as agent of Angelina County to Ford for such price so previously fixed by him, are acts void ab initio, and as such can not be ratified by the Commissioners' Court of Angelina County in any manner. Constitution 1876, art. VII, sec. 6; Logan v. Stephens County, 98 Texas, 283; Murchison v. White, 54 Texas, 81; Rue v. Missouri Pac. Ry. Co., 74 Texas, 480; Cummings v. Powell, 8 Texas, 85; Fuller v. O'Neil, 69 Texas, 349; Fourth Natl. Bank of Dallas v. Dallas, 73 S. W., 841; Cassin v. LaSalle County, 1 Texas Civ. App., 127; Noel v. City of San Antonio, 11 Texas Civ. App., 586; Pulliam v. Runnels County, 79 Texas, 365; Daniel v. Mason, 90 Texas, 240; Tomlinson v. Hopkins County, 57 Texas, 572; Nichols v. State, 11 Texas Civ. App., 327; City of Bryan v. Page, 51 Texas, 534; Ferguson v. Halsell, 47 Texas, 421; Gulf, C. & S. F. Ry. Co. v. Styron, 66 Texas, 425; Gano v. Palo Pinto County, 71 Texas, 99; Shelton v. Marshall, 16 Texas, 355; Edwards County v. Jennings, 33 S. W., 585; Norton v. Shelby County, 118 U. S., 454; County of Daviess v. Dickinson, 117 U. S., 657; Aspinwall v. Commissioners Daviess County, 22 Howard (63 U. S.), 365; Wadsworth v. Supervisors, 102 U. S., 534; Marsh v. Fulton County, 10 Wall., 683; Jefferson County v. Arrighi, 54 Miss., 668; Thomas v. Railway Co., 101 U. S., 85; Town of Newport v. Batesville & B. Ry. Co., 24 S. W., 427; Eddy Valve Co. v. Town of Crown Point, 3 L. R. A. (N. S.), 684; Weigel v. Pulaski Co., 32 S. W., 116; 1 Am. & Eng. Enc. Law, 2d ed., p. 1184; 23 Am. & Eng. Enc. Law, 2d ed., p. 889; Clark & Skyles on Agency, par. 115; 1 Dill on Mun. Corp., sec. 25, 463; McCracken v. San Francisco, 16 Cal., 591; Despatch Line of Packets v. Bellamy, 12 N. H., 232; Balch v. Beach, 119 Wis. 77.

If the Commissioners' Court of Angelina County could ratify the sale of the pine timber upon Angelina County's school land as made by Maroney to Ford in compliance with a previous order of said court, such ratification, if any, being a conveyance of lands, was required to be in writing. Rev. Stats., arts. 1554 and 1555; Statute of Frauds, article 2543, sec. 4; Sprague v. Haines, 68 Texas, 215; Robb v. San Antonio St. Ry. Co., 82 Texas, 392; Tolbert v. McBride, 75 Texas, 697; Wright v. Bearrow, 13 Texas Civ. App., 146; Dial v. Crane, 10 Texas, 454; Sanborn v. Murphy, 86 Texas, 437.

MCMEANS, ASSOCIATE JUSTICE.—On November 28, 1900, Angelina County was the owner of 5,140,118 square varas of land, granted to said county by the State of Texas for educational purposes. On that date the County Commissioners' Court of Angelina County in regular session entered the following order:

"It is ordered by the court that the following lands and timbers owned by Angelina County and being situated in Angelina County, Texas, which said land contains 5,140,118 square varas and is better known as the Angelina County school land, and which was patented by the State of Texas to said Angelina County on the 17th day of July, A. D. 1889, which patent is recorded in book 'Q' on pages 494 and 496, deed records of said Angelina County, to which record reference is here made for further description of said land; be and the same is this day put on the market for sale, and J. T. Maroney, county judge of said county, is hereby duly appointed and commissioned as the legal and qualified agent of said county to negotiate, sell and make good and sufficient title to the purchaser or purchasers of all or any portion of said land or timber so sold upon the following terms and stipulations, to wit: Provided that none of said land shall be sold for less than two dollars and fifty cents ($2.50) per acre, and the timber only, if sold separately from the land, at not less than the regular customary market price for same, and the purchase price of said timber only shall be paid in cash. The said land shall be sold either for cash or on credit as the said J. T. Maroney, agent as aforesaid, shall deem to be the best interest of said county; and if sold on credit, the vendor's lien shall be specially retained in the deeds of conveyance, on said land, to secure the deferred payments on same, and all deferred payments shall bear interest at six percent per annum. J. A. Sumrall voting 'No.'"

Thereafter on the 3d day of June, 1901, J. T. Maroney sold and conveyed to J. D. Ford all the merchantable pine timber growing upon all the land, except forty acres occupied by one Foster, for the consideration of $600 paid in cash, the deed conveying same, omitting the description and acknowledgment, being as follows:

"The State of Texas,
County of Angelina.

"Know all men by these presents: That I, J. T. Maroney, county judge, agent for the land and timber herein described of the county of Angelina and State of Texas, in consideration of the sum of six hundred ($600) dollars to me in hand paid by J. D. Ford have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said J. D. Ford, of the county of Angelina, in the State of Texas, all that certain merchantable pine timber now growing and standing on the hereinafter described 871 acres of land being situated in Angelina County Texas, a part of survey of 5,140,181 sqr. varas of land, and all of said survey except forty acres of same heretofore sold to Ed. Foster, the said forty acres so sold to the said Foster to be surveyed out of said 5,140,181 sqr. varas in a square block and to include the premises and improvements where the said Foster now lives, the timber herein conveyed being on the following described and bounded land and all the merchantable pine timber growing on said land except that growing on the forty acres heretofore sold to the said Ed Foster as above stated." (Then follows description.)

"To have and to hold the above described merchantable pine tim-

ber and right of way together with all and singular the rights and appurtenances thereto in anywise belonging to said premises, the said tramways, wagonways and skidways, exclusively unto the said J. D. Ford, his heirs and assigns, shall have gone over said land once and cut the merchantable pine timber thereon. It is understood and agreed by both parties hereto that when the party of the second part, J. D. Ford, or his assigns, shall have once gone over said land and cut and removed the merchantable timber or such timber as he or they may cut and remove when they first go over said land, then such portion of said land as gone over will no longer be under control of the said J. D. Ford or his assigns. The said J. D. Ford or his assigns has ten years only to remove said timber, when this deed shall become void.

"To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said J. D. Ford for a period of ten years, or till he removes said timber if removed before the ten years expires, heirs and assigns forever; and I do hereby bind myself and successors to warrant and forever defend all and singular the said premises unto the said J. D. Ford for a period of ten years only or till removed if removed sooner, his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof by, through or under said Angelina County.

"Witness my hand at Lufkin, Texas, this 3d day of June, 1901.

"J. T. Maroney, County Judge."

At the time of the execution of the deed Ford paid the consideration of $600 to Maroney, who in turn paid it over to the county treasurer of Angelina County and the same was placed in the permanent school fund of the county and afterwards, by order of the Commissioners' Court, invested in interest-bearing bonds; and thereafter, up to the time of the filing of this suit, the court annually collected the interest on said bonds and used the same for the benefit of its public schools. Before depositing the $600 in the treasury, and a few days after the sale and delivery of the deed to Ford, Maroney reported the sale of the timber and the price he had received therefor to the Commissioners' Court of Angelina County, then in session, and the court approved and confirmed the sale, a majority of the members of the court voting in favor of approval, and one member voting against it, but no order of approval or confirmation was entered in the minutes of the court. The appellant claims the timber through mesne conveyances from Ford.

This suit was filed by Angelina County on July 9, 1907, and was in the nature of an action of trespass to try title for the land and timber described in the deed executed by Maroney to Ford, less the forty acres occupied by Foster, which were excepted from the Maroney conveyance, and 226 2-3 acres which were sold by the county to the appellant in 1906.

The defendant answered by general denial, plea of not guilty, disclaimed title or interest in the fee except such interest as authorized and entitled it to enter upon the land and to cut and remove the

timber, and pleaded the sale by the county to its remote vendor, Ford; the payment of the consideration of $600 by Ford to the county through Maroney; the receipt and appropriation of the same by the county, and ratification and confirmation of the sale by the Commissioners' Court.

The plaintiff by supplemental petition denied Maroney's right to make the sale as agent of the county and alleged that such sale could only be made by the Commissioners' Court directly and not through an agent appointed by it; that if the attempted sale by Maroney was pursuant to the order of the Commissioners' Court the sale was void because of want of power in the Commissioners' Court to pass the order, and that if the plaintiff had received and appropriated the money paid by Ford to Maroney for the timber it tendered the same, with legal interest, to defendant or to such other person as might be shown to be entitled to the same; specially denied the power of the Commissioners' Court to ratify and confirm the sale made by Maroney, and alleged that no verbal confirmation of the sale could be made, and, if the sale could be ratified at all, it could be ratified only in writing. It prayed for the cancellation of the deed to the timber made by Maroney to Ford.

The case was tried before a jury which, under a peremptory instruction from the court, returned a verdict for the plaintiff, upon which verdict a judgment in its favor was accordingly entered, and from this judgment the defendant Carter-Kelly Lumber Company has appealed.

Appellant has presented several assignments of error for a reversal of the judgment of the court below, but we think it would serve no useful purpose to discuss them in detail.

As has been shown, the order of the Commissioners' Court directed Maroney to "sell and to make good and sufficient title to the purchaser or purchasers of all or any portion of said land or timber," and provided that the timber, if it should be sold separately from the land, "should be sold for not less than the regular customary price for same, and the purchase price of said timber only shall be paid in cash." Section 6 of article VII of the Constitution of this State vests in the counties of the State full title to all lands theretofore or thereafter granted to such counties for educational purposes, and by the following language confers upon each county the power to sell those lands: "Each county may sell or dispose of its lands in whole or in part in manner to be provided by Commissioners' Court of the county. . . . Said lands and the proceeds thereof when sold, shall be held by said counties alone as a trust for the benefit of public schools therein; said proceeds to be vested in the bonds of the United States, the State of Texas, or counties in said State, or in such other securities and under such restrictions as may be prescribed by law. . . . The interest thereon and other revenue, except the principal, shall be available fund."

Logan v. Stephens County, 98 Texas, 283, is a case very similar to this. In that case the Supreme Court said:

"The Constitution, as before quoted, gives to the Commissioners' Court of each county ample powers to sell the school lands of the

county; but it in terms declares that the counties hold 'the said land and proceeds thereof when sold, . . . alone as a trust for the benefit of the public schools therein.' The county was in the attitude of trustee for the benefit of the public school fund in the handling and management of the land, and we must construe the power given to the Commissioners' Court in accordance with the rules which govern trustees in the discharge of their duties. . . . With reference to the constitutional provision now under consideration, the act of selling is necessarily the direct act of the county through its Commissioners' Court, which is empowered to transact all its business."

That case is decisive of the point that the sale by Maroney under the power attempted to be conferred upon him by the Commissioners' Court was not a sale by the county; and, had there been no evidence of ratification by the county of the sale made by Maroney, the action of the trial court in instructing a verdict would have been in every way proper. But the undisputed evidence shows that Maroney, after he had made the deed to Ford and accepted the purchase money, reported the sale to the Commissioners' Court, and that the court adopted an order approving the sale as made, and directing Maroney to deposit the money in the treasury, and thereafter the money was, by order of the court, invested in interest-bearing bonds and the interest annually collected and used for the benefit of the public schools of Angelina County. In Gallup v. Liberty County, 57 Texas Civ. App., 175 (writ of error denied by the Supreme Court), it appears that certain lands granted by the State to Liberty County for educational purposes were sold by W. W. Perryman as agent of the county, acting under appointment of the Commissioners' Court of said county, which is similar in all material respects to the appointment of Maroney in this case, and of Walker in the Stephens County case. The consideration paid to Perryman was paid over by him to the county, except certain commissions which he was permitted to retain, and the Commissioners' Court, with knowledge of all the facts, directed that the proceeds of the sale be invested in State bonds, which was done; and thereafter the interest was collected and paid to the county treasurer, and by the treasurer placed to the credit of the available school fund of Liberty County. Several years afterward the bonds were sold by direction of the Commissioners' Court and the proceeds invested in other securities. There was not in that case, as in this, any express approval of the sale by the Commissioners' Court. Associate Justice Neill, in rendering the opinion of the court, says:

"The principle is axiomatic that where one person executes a deed purporting to be the act of another, without authority to do so, and the person for whom such act purports to have been done is fully apprised of all the facts connected therewith, and knowingly receives and uses the benefits derived from such sale, he thereby ratifies it and is estopped from asserting that the person purporting to act as his agent was without authority to make it. As is said: 'Ratification is the election by a person and the expression of such election by words or conduct, to accept an act or contract previously done

or entered into in his behalf by another who had at the time no authority to do the act or make the contract on his behalf. If certain acts have been performed or contracts made on behalf of another without his authority, he has, when he obtains knowledge thereof, an election either to accept or repudiate such acts or contracts. If he accepts them, his acceptance is a ratification of the previously unauthorized acts or contracts, and makes them as binding upon him from the time they were performed as if they had been authorized in the first place.' Clarke & Skyles on Agency, sec. 98. This principle applies to a municipal corporation the same as to an individual as to contracts which have been unauthorizedly entered into on its behalf, if it could have originally authorized such acts or contracts. If there is legal authority for the contract, though it be illegal because of some irregularity or informality in the manner or time of its execution and therefore incapable of enforcement, it may be ratified by an acceptance of the benefits of the contract by the corporation; but if there be no legal authority for the contract that authority can not be created through the application of any doctrine or principle of estoppel, acquiescence or ratification. Clark & Skyles on Agency, sec. 121; Abbott on Municipal Corporations, 279, 280; Smith's Modern Law of Municipal Corporations, 258, 259.

"The case before us does not disclose a sale beyond the scope and powers of Liberty County or of its Commissioners' Court, intrusted by the Constitution and laws of the State with its business, but one that the county is expressly authorized to make 'in the manner to be provided by the Commissioners' Court of the county.' The manner provided by the court was simply illegal. That is all. If the manner it provided had been legal, the sale would have been. Therefore we think the sale, though illegal, under which appellants claim the land in controversy, was such as could be ratified by the county, and that the facts found by the trial court show a full and complete ratification of it."

We think that the two decisions referred to settle the material points raised on this appeal, and the very full and satisfactory reasons given in each obviates the necessity of an extended discussion by us of the principles involved.

Appellee contends, however, that the Commissioners' Court was without authority to ratify the sale made by Maroney except in writing, and that as the act of the court in approving the sale was not entered in the minutes and not otherwise reduced to writing the approval did not amount to ratification or confirmation. This seems to have been settled adversely to appellee's contention by the following cases: Ewing v. Duncan, 81 Texas, 230; Waggoner v. Wise County, 17 Texas Civ. App., 220 (43 S. W., 836).

We think that under the undisputed facts of this case no judgment other than one in favor of the appellant should have been rendered. The judgment of the court below is, therefore, reversed and judgment here rendered for appellant.

Reversed and rendered.

Writ of error refused.

MEDLIN MILLING COMPANY v. B. J. SCHMIDT.

Decided February 19, 1910.

1.—Master and Servant—Defective Machinery—Promise to Repair—Assumed Risk.

Although an employee knows that machinery which he is using is defective, he does not assume the risk arising from its use after he has informed his employer of the defect and the employer has promised to repair the same, so long as he has reasonable ground to expect and does expect the employer to fulfill his promise, and provided that a man of ordinary prudence would have continued the service under all the circumstances.

2.—Same—Case Stated.

In a suit by an employee against his employer for damages for personal injuries caused by his hand being caught in revolving wheels over which there was no guard to prevent such an occurrence, evidence considered and held sufficient to support a finding that plaintiff was entitled to recover although he knew of the defect in the machinery with which he was required to work.

Appeal from the District Court of Tarrant County. Tried below before Hon. Mike E. Smith.

Bryan & Spoonts, for appellant.—A servant is relieved of the assumption of risk arising from the use of machinery or appliances which he knows to be defective only so long as is reasonably necessary to do the work of repairing such appliance. Hilje v. Hettich, 95 Texas, 321; Labatt on Master and Servant, sections 290b and 425; 26 Cyc., 1213.

McLean & Carlock, for appellee.—The servant has the right to rely upon the assumption that the master has done his duty with respect to furnishing him a reasonably safe place in which to work, reasonably safe machinery and appliances to work with, and if he becomes apprised that the master has not done so, and learns that the machinery is defective, or the place unnecessarily dangerous, he assumes the risk incident to that condition of affairs, unless he informs the master and the latter promises to correct the evil. In this latter event, so long as he has reasonable grounds to expect and does expect that the master will fulfill his promise, he does not, by continuing in the employment, assume the additional risk arising from the master's neglect. If he then be injured by reason of that neglect, he may recover, provided it be found that a man of ordinary prudence under all the circumstances, would have encountered the danger by continuing in the service. Texas & N. O. R. Co. v. Bingle, 91 Texas, 288. It will be observed that the Brentford case in 79 Texas, 619, relied on by counsel for appellant, is practically overruled in so far as the above point is involved, by the later and better considered decision of the Supreme Court in the Bingle case. Missouri, K. & T. Ry. Co. v. Baker, 35 Texas Civ. App., 542; Gulf, C. & S. F. Ry. Co. v. Donnelly, 70 Texas, 371; Hilje v. Hettich, 95 Texas, 325; Hough v. Texas & P. Ry. Co., 100 U. S., 213; Dowd v. Erie Ry. Co. (N. J.), 57 Atl., 249. (The attention of the court is particularly called to

the foregoing case, as it is a well considered case by an able court, and almost as nearly like the facts of this case in its main features as it is possible for two different cases to be.) Rice v. Eureka Paper Co. (N. Y. Court of Appeals), 62 L. R. A., 611; 1 vol. Labatt, 1185 to 1213.

The question (1) whether the risk incident to the doing of the work plaintiff was attempting to do when injured was so obviously dangerous as that no man of reasonable prudence would have undertaken the same; (2) whether a man of reasonable prudence would have undertaken the service, or continued in the service of the defendant at said time under the circumstances; (3) whether in doing the work in question the plaintiff was exercising reasonable care under all the circumstances, were questions of fact properly submitted to the jury and admitting of diverse inferences upon the testimony, and such being the case the verdict of the jury, finding support in the testimony, will not be disturbed by the Appellate Court. Dowd v. Erie Ry. Co., 57 Atl., 250; Rice v. Eureka Paper Co., 62 L. R. A., 611; Hough v. T. & P. Ry. Co., 100 U. S. 213; Galveston Oil Co. v. Thompson, 76 Texas, 237; Fort Worth & R. G. Ry. Co. v. Day, 55 Texas Civ. App., 24; Waggoner v. Porterfield, 55 Texas Civ. App., 169.

DUNKLIN, ASSOCIATE JUSTICE.—The Medlin Milling Company has appealed from a judgment rendered against it in favor of B. J. Schmidt, who sued to recover damages for injury to his hand while working in defendant's mill. Schmidt was an employe of the defendant company at the time of his injury, and while so employed his hand was caught and crushed between revolving wheels of some of the machinery of the mill. Over these wheels there was no guard to prevent such an accident and plaintiff alleged that defendant was guilty of negligence in failing to provide such an appliance. He further alleged that he called the attention of the defendant's foreman and vice-principal to the absence of such a guard and to the necessity therefor; that thereupon he was assured by the foreman that such a guard would be provided; that plaintiff had continued in the defendant's employment relying upon the performance of such promise, and that the time intervening between the date of the promise and the date of the injury was a reasonable time for plaintiff to await the performance of the promise.

Upon the trial plaintiff testified that the promise to repair alleged in his petition was made on Wednesday or Thursday, and that the accident happened on the following Monday. According to his testimony, immediately before the accident plaintiff by the use of a wrench was attempting to unscrew a bolthead on some part of the milling machinery situated near the wheels in which his hand was caught and while so engaged the wrench slipped and caused his hand to be suddenly thrust between the wheels. Plaintiff further testified that at the time he undertook to do this work he knew that the foreman had not complied with his promise to provide a guard to protect defendant's employes from the danger of getting their hands into those wheels, and that he knew of such danger, but thought he could

perform the service he was attempting in such manner as to avoid injury.

Appellant insists that the trial court should have given a peremptory instruction in favor of the defendant, the contention being made that plaintiff's own testimony showed conclusively that his injury was the result of a risk assumed by him, or else as a result of his own contributory negligence. In the case of Texas & N. O. Ry. v. Bingle, 91 Texas, 288, our Supreme Court says: "The servant by entering the employment of the master assumes all the ordinary risks incident to the business, but not those arising from the master's neglect. It is the duty of the master to exercise ordinary care to furnish him a safe place in which to work, safe machinery and appliances, to select careful and skillful coworkers, and in case of a dangerous and complicated business to make such reasonable rules for its conduct as may be proper to protect the servants employed therein. The servant has the right to rely upon the assumption that the master has done his duty; but if he becomes apprised that he has not and learns that the machinery is defective, the place unnecessarily dangerous, or that proper rules are not enforced, he assumes the risk incident to that condition of affairs, unless he informs the master and the latter promises to correct the evil. In this latter event, so long as he has reasonable grounds to expect and does expect that the master will fulfill his promise, he does not by continuing in the employment assume the additional risk arising from the master's neglect. If he then be injured by reason of that neglect, he may recover, provided it be found that a man of ordinary prudence under all the circumstances would have encountered the danger by continuing in the service. This we understand to be the rule in the English courts. It is the rule in the Supreme Court of the United States and is supported by the weight of authority." See also Hilje v. Hettich, 95 Texas, 325; Gulf, C. & S. F. Ry. v. Donnelly, 70 Texas, 371.

In view of plaintiff's testimony of the alleged promise by defendant's foreman to provide a guard over the wheels in which plaintiff's hand was caught, and the time intervening between that promise and the date of the accident, it could not be said that plaintiff assumed the risk of injury to himself even though at the time of the accident he knew of the danger, unless his testimony showed conclusively as a matter of law that at the time of the injury he had no reasonable grounds to expect that the promise to repair would be fulfilled.

Neither could it be said that the evidence showed conclusively as a matter of law that he himself was guilty of negligence proximately contributing to his injury. The determination of those issues was exclusively within the province of the jury. The case was tried before a jury and the issues of assumed risk and contributory negligence were fully and fairly presented and consequently there was no error in the court's refusal to give the several instructions specially requested by the defendant, the refusal of which has been made the basis of other assignments presented in appellant's brief.

We have found no error in the record and the judgment is affirmed.

Affirmed.

Writ of error refused.

GULF, COLORADO & SANTA FE RAILWAY COMPANY v. J. A. BENNETT.

Decided February 19, 1910.

1.—Railroads—Killing Live Stock—Switch Limits—Burden of Proof.

A verdict against a railroad company for killing a horse within the switch limits of a town where the track could not be fenced, could not be sustained when the evidence failed to show when the horse got upon the track, or whether, from the view point of those operating the train, its approach to the track was discoverable in time to have avoided the injury; and this, though the whistle was not sounded nor the bell rung, and the train passed through the town at a high rate of speed; and it was undisputed that the train killed the horse. There was no causal connection shown between the acts of negligence and the injury.

2.—Pleading—Negligence—Charge.

In a suit for damages resulting from negligence, the charge should confine the jury to the negligence alleged, and not submit the issue of negligence generally.

3.—Road Crossing—Killing Live Stock—Statutory Signals.

The duty of blowing the whistle or ringing the bell at road crossings is imposed for the benefit of those who are using or about to use the crossing. In the matter of killing live stock those signals are immaterial except as they may bear on the question of care on the part of the train operatives to avoid injury to the stock.

Appeal from the County Court of Bosque County. Tried below before Hon. P. S. Hale.

Terry, Cavin & Mills and *A. H. Culwell,* for appellant.—Before plaintiff was entitled to recover, the burden was upon him to show that the death of the animal was the result of failure to exercise ordinary care on the part of those who were handling the train, and the evidence in this case fails to show that such accident was the result of the failure of any degree of care. Missouri, K. & T. Ry. Co. v. Baker, 99 Texas, 452; Gulf, C. & S. F. Ry. Co. v. Anson, 101 Texas, 198; Texas & P. Ry. Co. v. Shoemaker, 98 Texas, 451; Henry v. Missouri, K. & T. Ry. Co., 65 S. W., 644.

James M. Robertson, for appellee.—The question of negligence being one of fact in killing the mare, and the case having been fully and fairly submitted to the jury on that issue, and the jury having found that the mare was killed by the negligence of appellant, with evidence fully warranting the verdict, the case should be affirmed. Sayles' Statutes, article 4507, and authorities thereunder cited.

CONNER, CHIEF JUSTICE.—This suit was instituted in the County Court of Bosque County to recover the value of a certain mare alleged to have been killed by one of appellant's trains in the switch yards of the appellant company at the town of Morgan. It was alleged that appellant was guilty of negligence in that it failed to keep a sufficient lookout and failed to ring the bell or to blow the whistle, and that the train was running at the high rate of speed of some thirty or forty

miles per hour. Appellant answered by the general denial, and specially, that the accident occurred in the station grounds, and at a place where public policy prohibited the defendant from fencing its track, and that this accident was not the result of any negligence of any of the servants of the company. The trial resulted in a verdict and judgment in appellee's favor for the um of two hundred and twenty-five dollars.

Several assignments present the question of whether the evidence on the issue of appellant's negligence is sufficient to support the verdict and judgment. Adopting the view of the testimony most favorable to appellee, the evidence shows that appellee's mare was killed by appellant's northbound fast passenger train, which passed through the town of Morgan about daylight on the morning of the 19th day of January, 1909. The train was not scheduled to stop at Morgan, but ran through without check of speed, and without whistling, and without the ringing of a bell. No witness, however, saw the animal struck; the evidence merely shows that a witness saw the train run through a bunch of horses, and appellee's mare was soon afterwards discovered near the track so injured that she soon thereafter died. The testimony entirely fails to show when appellee's mare got upon the track, or whether, from the view-point of those operating the train, her approach to the track was discoverable in time to have avoided the injury, and we feel unable to say that there is any evidence that tends to show that either the failure to whistle or to ring the bell or to check the speed of the train was the proximate cause of the killing. For aught that the evidence shows, the animal, or the entire bunch of animals, may have suddenly appeared and attempted to cross the track at a time when it would have been impossible to check the speed of the train, and under circumstances that would render the ringing of a bell or blowing of a whistle wholly unavailing. In short, the circumstances of the killing are unexplained, and the matter is left entirely to conjecture as to whether or not it was negligence under the circumstances to operate the train at the speed shown, or to fail to ring the bell or to blow the whistle, or, if so, whether such negligence was a proximate cause of the result. It is undisputed that the mare was killed within the switch limits of the town of Morgan, and at a place where public policy did prevent the fencing of appellant's track, and the burden was hence undoubtedly upon appellee to establish negligence on appellant's part which proximately caused the loss of his mare. This has not been done, in our judgment, and we must therefore sustain all those assignments of error which raise this question. See Missouri, K. & T. Ry. v. Baker, 99 Texas, 452; Gulf, C. & S. F. Ry. v. Anson, 101 Texas, 198; Texas & P. Ry. v. Shoemaker, 98 Texas, 451; Henry v. Missouri, K. & T. Ry., 65 S. W., 644; Missouri, K. & T. Ry. of Texas v. Parker, 46 S. W., 280; Missouri, K. & T. Ry. v. Parker, 37 S. W., 973.

In view of the reversal, we suggest that the criticism of the first paragraph of the court's charge be avoided by confining the jury to the negligence alleged, instead of submitting the issue of negligence in general terms, as the charge does. We find no error in the refusal of the special charges. The court assumed in his charge that, before the plaintiff would be entitled to recover, the burden was upon him to

show negligence on appellant's part, and the issue was submitted in no other way. It was therefore unnecessary to give defendant's special charges Nos. 2, 3 and 4, to the effect that the law did not require fencing at the place where the appellee's mare was killed, and that hence appellee must show some act of negligence proximately causing the injury charged before he was entitled to recover.

Appellant's special charge No. 5, presented in the ninth assignment of error, we think, was properly rejected. The fact that the operatives of the train failed to sound the bell or blow the whistle for the road crossing at a short distance beyond the point where the mare was killed is immaterial. It has been often held that the duty of giving these warnings is imposed for the benefit of those who are using or about to use the crossing, and the question in this case, with reference to the warnings, was not whether they were given for the crossing, but whether, in the exercise of ordinary care, the operatives of the train should have given the warnings to avoid injury to the mare.

Because of the court's failure to grant a new trial on the ground that negligence was not shown, the judgment will be reversed and the cause remanded for a new trial.

Reversed and remanded.

ST. LOUIS, SAN FRANCISCO & TEXAS RAILWAY COMPANY ET AL. v. Z. L. CASON.

Decided February 19, 1910.

1.—Master and Servant—Place to Work—Duty and Liability of Master— Negligence—Burden of Proof.

In a suit by a railroad machinist against his employer, a railroad company, for damages for personal injuries caused by his stepping upon some rolling object on the floor of the machine shop and being thereby thrown into an ash pit and burned, the following principles must apply and control: First, that it was the duty of the employer to exercise ordinary care to furnish the employee a reasonably safe place in which to work; second, that a defect existed in the place furnished; third, that the defect was of such character that ordinary care on the part of the employer would have discovered and remedied it; and fourth, that the negligence of the employer proximately caused the injury complained of. A failure to prove any one of said facts would be fatal to a right to recover. Evidence considered and held insufficient to show negligence on the part of the employer.

2.—Negligence—Res Ipsa Loquitur.

The following rule of res ipsa loquitur approved: "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care."

Appeal from the District Court of Tarrant County. Tried below before Hon. Mike E. Smith.

Andrews, Ball & Streetman and *Chapman & Lockett*, for appellants. —Negligence can not be inferred from the mere fact that plaintiff was

caused to fall by something rolling under his foot, there being nothing to show what that something was, nor how long it had been there, nor who put it there. McCray v. Galveston, H. & S. A. Ry. Co., 89 Texas, 170; Broadway v. San Antonio Gas Co., 24 Texas Civ. App., 603; Dueler Mfg. Co. v. Dullnig, 83 S. W., 890; Missouri, K. & T. Ry. Co. of Texas v. Romans, 121 S. W., 1104; Chicago & N. W. Ry. Co. v. O'Brien, 132 Fed., 596; Shandrew v. Chicago, St. P., M. & O. Ry. Co., 142 Fed., 322; Cryder v. Chicago, R. I. & P. Ry. Co., 152 Fed., 418; Byers v. Carnegie Steel Co., 159 Fed., 350.

There was no evidence tending to support the allegation that defendant was guilty of negligence in the permitting of something which plaintiff claims was under his foot, and rolled, and caused him to fall, except the uncorroborated statement of the plaintiff to the effect that there was something under his foot which rolled and caused him to fall, and this was contradictory of his statement made on different occasions after the accident and prior to the institution of this suit. Same authorities.

Odell & Johnson and *Capps, Cantey, Hanger & Short,* for appellee. —There was abundant evidence of negligence on the part of defendant, and therefore the court did not err in refusing defendant's special requested instruction No. 1. Texas Cent. R. Co. v. Johnson, 51 Texas Civ. App., 126; Barnowski, Adm'r, v. Helson, 15 L. R. A., 33; Crawford v. Houston & T. C. R. Co., 89 Texas, 92.

It was the duty of the defendant railroad company to exercise ordinary care to furnish to the plaintiff a reasonably safe place to work, and the plaintiff had a right to assume that defendant had done its duty in this respect, and it was not incumbent upon plaintiff to make an inspection upon the premises or place where the work was being done in order to ascertain if the defendant had performed its duty. Texas & N. O. R. Co. v. Bingle, 91 Texas, 287; Texas & N. O. R. Co. v. Echols, 25 S. W., 1087; Webster v. Stewart Iron Works, 104 S. W., 708; Bates-Rogers Const. Co. v. Dunn, 93 S. W., 1032; Chicago, R. I. & P. Ry. Co. v. Birk, 44 Texas Civ. App., 614.

In an action by a servant against a master, where the plaintiff has proved an accident which implies negligence, it is not incumbent on him to go further and show what the particular negligence was, when from the circumstances it is not in his power to do so. McCray v. Galveston, H. & S. A. Ry. Co., 89 Texas, 168; Gulf, C. & S. F. Ry. Co. v. Wood, 63 S. W., 164; Howser v. Cumberland & Pa. Ry. Co., 27 L. R. A., 154.

Where there is evidence of negligence on the part of the defendant it is the duty of the court to submit such issue to the jury for them to determine, and their finding is conclusive on that question. Missouri, K. & T. Ry. Co. v. Edwards, 67 S. W., 891; International & G. N. R. Co. v. Ormond, 64 Texas, 489; International & G. N. R. Co. v. Gray, 65 Texas, 36; Missouri, K. & T. Ry. Co. v. Wylie, 26 S. W., 85.

SPEER, ASSOCIATE JUSTICE.—Z. L. Cason was employed by appellants as helper to one of their machinists, and while engaged in the act of repairing one of their engines in the machine shops at Fort Worth in some way his foot slipped or rolled, and he was precipitated

into the ashpit, receiving injuries for which he recovered judgment in the sum of five thousand dollars. Inasmuch as we have decided to reverse and remand the cause because there was no evidence to show negligence on the part of appellants, we will set out the entire statement of appellee in reply to appellant's assignment raising this question. The statement fairly exhibits the circumstances surrounding the injury and includes all the evidence worth stating which could in any manner affect the disposition of the case.

"The plaintiff, Z. L. Cason, among other things testified as follows:

"'Mr. Kelly got up on that side—the right-hand—and I got my wrench after he got up on that side, to go around to get up on the other side, and as I made the reach for the wrench, when I raised up to get the wrench my foot rolled from under me and I fell in the pit. . . . I can not tell you how far my foot rolled, but it must have rolled some ten or twelve inches. I can not tell you what it was it rolled on, but it was a rolling substance of some kind; I could feel it under my foot. That is the way I could tell it was a rolling substance, by feeling it under my foot. . . . When my foot rolled on this substance I fell into the pit.'

"Later on in his testimony the witness also testified: 'I was standing still between the time that I put my wrench up there and the time I reached to get it; I was just standing in the same position, I think—had not moved, that I know of, one way or the other. I do not know what kind of a thing it could have been under my foot. I could tell by the feeling of it that there was something under my foot that rolled, but I could not tell what it was—don't know whether it was iron or wood or what it was; it was done so quick I don't know what it felt like. I just felt it under my foot.'

"The witness S. R. Ratcliffe, introduced by the defendant railroad company, testified that he was timekeeper at the defendant's shops at the time the plaintiff was injured, and that he took a statement in writing from the plaintiff, which was introduced in evidence on the trial, and after detailing the manner of his taking the statement and identifying the written statement, testified as follows on direct examination: 'As to whether or not he gave me full particulars about the accident and the cause of it, I will say that he said there was some rubbish around there.' On cross-examination he further testified as follows: 'He mentioned something about rubbish being around there. As to why I didn't put that down, will say there was no rubbish around there. It was after he had signed the statement that he mentioned the rubbish being around there. He didn't mention it to me directly, he mentioned it to several. That was when we were moving him out of roundhouse five or ten minutes after the statement was made and when I started back to the office. I heard him make that statement, and I didn't put it down because the statement was already signed and I had nothing more to do with it. I thought that was immaterial in the case, and I just put down what I thought was material in the case.'

"The same witness further on made the following statement: 'When I was going away I heard him say something about rubbish to the boys. The boys asked him how it happened after I was going away with the statement.'

"This witness again testified with reference to the condition of the shops: 'There was a foreman and seven men that worked there. They came to work at seven o'clock. These men did not clean up the rubbish that accumulated there during the night. A man working on an engine is supposed to clean up his own rubbish. Usually, the first thing this man would do would be to clean his lights. I don't know just what he would then do—would probably commence sweeping around the roundhouse.'

"C. P. Smith, a witness for the defendant railroad company, on cross-examination, testified as follows:

" 'Q. What is the difference of the labor performed by the day men and the night men?'

" 'A. In the daytime they figure on keeping engines there for shop purposes, you know, and then they have an outside gang—what they call the bull gang. That is something we didn't have at night. They clean up the roundhouse and the outside of it. I think it is composed of about twelve men. We have no one there at night that cleans up. The cleaning is all done in the daytime and the roundhouse is left in perfect shape at night.'

"W. L. Gibbs, a witness for the defendant railroad company, testified as follows: 'The floor of the roundhouse is constructed of cinders and head-end cinders on top. When properly put down they make a good floor, smooth and firm. This floor in October last was good, as I remember it.'

"The witness P. H. Kelly, testifying concerning the accident and the aid rendered to the plaintiff afterwards, testified as follows: 'I don't remember much that he said then; I can not say what he said then. I suppose he said something, but I don't know what it was.' The same witness also testified: 'The ground around this pit was tamped cinders, and it was as smooth as this floor. Of course, the cinders were of different shapes and sizes; these were coal cinders of different shapes and sizes. I suppose that sometimes lumps of coal roll off the engines or are knocked off the engines. . . . In working on the engines, of course, we used different materials around there—pipes and nuts and bolts of various sizes and shapes. It is not a fact that they work as many men at night as they did in the daytime. At night they got along with just as few men as they could; the men in the daytime did all the work that was necessary to be done, and the men at night did all the work that was necessary to be done, but they never have as many men at night as they do in the daytime—something like half as many. In the daytime they had a gang of men to tamp cinders and clean up around the roundhouse, but in the night-time they did not have; the night men did not make proportionately as much mess according to the number of men employed as the day men did, because there is no carpenter at work in the night, and have as little work done as can be gotten along with.'

"Mrs. Z. L. Cason, wife of the plaintiff, in the court below testified as follows: 'I saw Mr. Kelly on the morning Mr. Cason was injured. I suppose he came into town on the six o'clock car; he generally comes on that car, and Mr. Cason was brought in between eight and nine o'clock, after Mr. Kelly had already brought me the word. When Mr.

Kelly brought me the word about Mr. Cason being hurt, I asked him the particulars. Mr. Kelly came to my house that morning and knocked on the door, and I got up and dressed myself, and went out there and spoke to him, and he says: "Mrs. Cason, I am very sorry to tell you that Mr. Cason got seriously crippled this morning," and I said: "How in the world did it happen?" and Mr. Kelly said that he stepped on a rolling piece of iron and it threw him in the ashpit. I did not know at that time what an ashpit was at all.'"

At the very threshold it will be necessary to call to mind some of the elementary principles applicable to a case like this, and as to which there can be no divergence of views. First, it is the duty of the employer to exercise ordinary care to furnish his employe a reasonably safe place in which to do his work. Second, in order to recover for an injury the employe must prove that a defect existed in the place furnished him. Third, it must appear that the defect was of such character that ordinary care on the part of the master would have discovered and remedied it. Fourth, that the negligence of the employer proximately caused the injury complained of. Now, in the present case the burden was upon appellee to offer evidence fairly tending to prove each of these propositions, and if he failed in any respect he was not entitled to a verdict at the hands of the jury.

It may be admitted for the purposes of this appeal that appellee has shown that a defect existed in the place furnished him in which to do his work, and that as a proximate result of this defect he sustained injury, but it is yet to be determined whether the evidence above quoted affords any proof of negligence on the part of appellants proximately producing such injury.

But appellee invokes the principle symbolized by the maxim, *res ipsa loquitur*. We need cite no authority for the proposition that proof of an injury alone affords no evidence of negligence, since such is universally conceded to be the rule. This is necessarily true, for to say merely that the plaintiff was injured, without at the same time exhibiting any of the circumstances surrounding the occurrence, proves nothing with respect to the responsibility for it. It neither shows that the plaintiff nor the defendant was negligent in the matter, nor does it tend to do so. Logically, such evidence does not even prove that the place where the injury occurred was dangerous. It may have been an accident. It is obvious then that some of the circumstances surrounding the occurrence must be detailed before any inference of blamableness can be drawn. It is at this point that the conception embodied in the maxim invoked has its origin, and the rule has perhaps never been more accurately stated than in the oft-quoted language of Chief Justice Erle (Scott v. London & St. K. Docks Co., 3 H. & C., 596), as follows: "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." Our own Supreme Court, through Mr. Justice Brown (McCray v. Galveston, H. & S. A. Ry. Co., 89 Texas, 168), quotes this language with approval,

and adds: "It is well settled by authority that the circumstances attending the injury may be sufficient to establish the fact of negligence without any direct proof thereof."

In an earlier case (Texas & N. O. Ry. v. Crowder, 63 Texas, 502) our Supreme Court says: "There is no doubt that cases occur in which the accident is of such character as, of itself, when considered in connection with the facts which necessarily appear in showing the accident, to amount to sufficient proof of the want of due care by a defendant, and of the exercise of due care by a plaintiff, to authorize a jury to find both facts, without any direct proof on either point; but this does not affect the question of burden of proof, but relates rather to the sufficiency of the evidence furnished by the accident itself." So that, from these authorities, and numerous others which might be cited, it is safe to say that the rule of *res ipsa loquitur* is not one of substantive law, but is a rule of evidence only. And furthermore, that when the "accident" or "injury" or "act" or "thing itself" is referred to in the decisions as furnishing evidence of negligence, it is not meant that the injury alone furnishes such evidence, but that the attendant circumstances supply the necessary inference. It is at last proof of negligence, and not a presumption at all.

A question has arisen whether or not the rule is ever applicable to a case involving the relation of master and servant, and some courts have held flatly that it is not. Broadway v. S. A. Gas Co., 24 Texas Civ. App., 603 (60 S. W., 270.) But there is no reason for this holding when the rule is rightly understood, and the false conclusion doubtless has grown out of the fact that, for reasons presently to be stated, the rule is less frequently applied to that character of actions.

The first test to support the rule laid down in the defintion above quoted is that the thing is shown to be under the management of the defendant or his servants. This obviously means servants other than the plaintiff, and, since most master and servant cases fail to measure up to this standard, the rule itself, perhaps, has been thought to have no application. The rule is correctly settled in McCray v. Galveston, H. & S. A. Ry. Co., *supra,* in the following language: "Undoubtedly the presumption has been more frequently applied in cases against carriers of passengers than in any other cases of negligence, but there is no foundation in authority or in reason for any such limitation of the rule of evidence, as the presumption originates from the nature of the act, not from the relations between the parties." (See also Jenkins v. St. Paul City Ry. Co. (Minn.), 117 N. W., 928; Byers v. Carnegie Steel Co., 159 Fed., 347.) It has been suggested (Patton v. Texas & P. Ry. Co. (U. S.), 45 L. Ed., 361; Hamilton v. Kansas City Southern Ry. Co., 100 S. W., 671), that "a presumption" aids the plaintiff where the plaintiff is a passenger (or inferably a stranger), but does not do so in the servant's case, hence the distinction. But to our minds the real distinction, which requires less proof in an action brought against a railway company by a passenger or stranger than in an action brought by one of its servants, arises from the requirement already adverted to, that "the thing" must be shown to have been under the management of the defendant. The reason for this important distinction consists in this: that the rule itself has force only because

it justly imposes upon a party the duty of producing evidence as to facts peculiarly within his knowledge. Wigmore on Evidence, section 2509. At this initial point appellee's case fails, when tested by the rule, because the thing resulting in his injury was not shown at the time to be under the control of appellants any more than it was under his own control.

Again, it is perfectly apparent that appellee gains no comfort from this rule, unless the proof of a defect affords some evidence of negligence on the part of appellants, whose duty it was to exercise ordinary care to furnish him a safe place to work, even if we concede that he is not precluded for the reason given immediately above. The only evidence, which under the most favorable view tends to show negligence, is that a rolling substance on appellants' shop floor caused appellee's foot to slip and threw him into the pit. What this substance was, who placed it there, how long it had been there, or whether it was reasonably calculated to produce an injury such as plaintiff's was, are matters as to which the evidence is wholly silent. It may be conjectured that this rolling substance was left through the negligence of appellants' servants, whose duty it was to clean up the premises, but this is only a conjecture. Another conjecture equally as reasonable, to say the least, is that appellants' servants had performed their full duty, and the substance was afterwards dropped about the engine by some of the laborers without negligence on the part of any one. The one inference is as reasonable as the other. There is therefore no reason for preferring the one over the other. The nature of the obstruction or defect is temporary and transient, rather than inherent or permanent, and therefore shows nothing as to the length of time it had existed. It is not like a defect of such character as to show within itself the master ought to have known of its existence. If the defect had been in construction, or otherwise appeared to be of such duration as that the master in the exercise of due care must probably have known of it, a different question would be presented. But here we have the naked defect, from which either an inference of negligence may be drawn or not, according to the fancy of one's imagination.

Mr. Justice Williams, in Missouri, K. & T. Ry. Co. of Texas v. Romans (121 S. W., 1104), speaking to this very point, says: "No hypothesis on which liability could be founded is supported by evidence, unless it is true that the mere existence of the hole in the condition described by the witnesses is of itself evidence of negligence. This could only be said if it were true that a hole so situated could not probably have existed without knowledge on part of some employe of defendant for whose negligence it is responsible, supposing that employe had exercised proper diligence; and it seems obvious that this is not true." So here, the very condition shown could probably have existed without knowledge on the part of any of appellants' employes for whose negligence it would be responsible. The situation, therefore, not only does not necessarily speak negligence, but such conclusion is not even the most probable one.

The case of Galveston, H. & S. A. Ry. v. Smith, 100 Texas, 267, is not contrary to this view, but fully supports it in that the Supreme Court there held that there was evidence sufficient to authorize the

jury to find that the cause of the giving away of the handhold which resulted in Smith's injury "was that the nut was too large for the bolt, and not that the nut came apart from an undiscoverable latent defect." In that opinion the learned Chief Justice thus states a case: "Otherwise it would have appeared from the case made that the accident was a result of one of two causes, either that the nut split from a latent defect, or was too large for the bolt, and therefore came off from the pressure put upon it. In such event, we think that the plaintiff would have made no case. Since the testimony of defendant showed a probability that the cause of the accident may have been a defect in the nut not discoverable by due diligence, it was not enough to show a mere possibility that it may have resulted from another cause which was brought about from the negligence of the defendant."

The logical rule undoubtedly is, that unless the circumstances surrounding the injury render it more probable that the injury was due to the negligence of the defendant than otherwise, the act speaks nothing within itself, and affords no just inference against the defendant, and the doctrine of *res ipsa loquitur* has no application to the case. Patton v. Texas & P. Ry. Co. (U. S.), 45 L. Ed., 362; Moriarty v. Schwarzchild & Sulzberger Co. (Mo.), 112 S. W., 1034; McGowan v. Nelson (Mont.), 92 Pac., 40; Peters v. Lynchburg, etc., Light Co., 61 S. E., 745; Byers v. Carnegie Steel Co., 159 Fed., 347; Norfolk & W. Ry. Co. v. Reed, 167 Fed., 16-24; McGrath v. St. Louis Transit Co., 94 S. W., 872.

Since we hold there is no evidence tending to show negligence on the part of appellants sufficient to support the judgment in appellee's favor, the judgment of the District Court is accordingly reversed and the cause remanded for another trial.

Reversed and remanded.

TEXAS CENTRAL RAILROAD COMPANY v. HICO OIL MILL.

Decided February 19, 1910.

1.—Railroad—Killing Stock—Switch Limits—Charge.

In a suit against a railroad company for the value of mules struck and killed by one of defendant's trains, and wherein the defendant contended that the place where said mules were killed was within the switch limits and it was therefore not required to fence its track at said place, charge of the court considered and approved.

2.—Same—Burden of Proof—Charge.

In a suit against a railroad company for the value of animals struck and killed by one of its trains, the plaintiff alleged that the defendant was negligent in failing to provide a sufficient headlight and in failing to keep a proper lookout to avoid killing the animals; the defendant answered and contended that its employees exercised ordinary care to avoid killing the animals: the court charged the jury that the burden was on each party to establish his contention by a preponderance of the testimony. Held, said charge was erroneous in that it placed upon defendant the burden of establishing by a preponderance of the evidence the negative of plaintiff's allegations of negligence.

3.—Same—Charge.

In a suit for the value of animals struck and killed by a railroad train, charge considered and held not subject to the objection that it gave undue emphasis to plaintiff's allegations of negligence.

4.—Same—Charge—No Conflict in Evidence.

It is error for the trial court to submit as an issue a fact about which there is no conflict in the evidence.

5.—Same—Incomplete Charge.

The issue being whether or not a railroad company was relieved from the duty of fencing its track at a place where the plaintiff's animals were killed, the court charged the jury as follows: "The burden of proof is upon the defendant to show that it was necessary to keep the track unfenced at said place; and unless you find from the evidence that it was necessary to keep said track at said place unfenced, you will find for the plaintiff." Held, defective in that it gave the jury no guide by which to determine what conditions would render it necessary to keep the track unfenced.

Appeal from the County Court of Comanche County. Tried below before Hon. J. M. Reiger.

Martin & George, for appellant.—The court erred in the fifth subdivision of his charge. Hays v. Hays, 66 Texas, 609, and authorities cited therein.

The court erred in the fourth paragraph of his charge. Revised Civil Statutes, art. 1317; Gulf, C. & S. F. Ry. Co. v. Finley, 11 Texas Civ. App., 64; Campbell v. Trimble, 75 Texas, 271; Fort Worth & R. G. Ry. Co. v. Hudgins, 43 Texas Civ. App., 200; Missouri, K. & T. Ry. Co. v. Hunt, 47 S. W., 70; Denham v. Trinity Lumber Co., 73 Texas, 83.

The court erred in the sixth paragraph of his charge in instructing the jury that the switch limits is that part of the track and right of way between the switch stands at each end of the switch and such other parts of the track as is necessary to be used by the employes in uncoupling the cars and in operating the switch stands, and only such parts as is necessary to be used by the employes in walking or running over the track in coupling and uncoupling the cars and in operating the switch, because the switch limits are not confined in law to the switch stands, but to such parts of the main track that would be necessary in operating its trains on and off the siding and sidetrack at its depots and stations, and because said instructions were misleading and confusing. Gulf, C. & S. F. Ry. Co. v. Blankenbeckler, 13 Texas Civ. App., 254.

If the railroad company kills an animal at a place on its right of way where, under the law, it is not required to fence, the burden of proof is upon the plaintiff to show that the railroad company did not exercise ordinary care in the operation of its train at the time said animals were killed. International & G. N. R. Co. v. Cocke, 64 Texas, 153; Gulf, C. & S. F. Ry. Co. v. Blankenbeckler, 13 Texas Civ. App., 254.

Jenkins & McCartney, for appellee.

DUNKLIN, ASSOCIATE JUSTICE.—Two mules belonging to the Hico Oil Mill were killed by a train of the Texas Central Railroad Company upon its track near the town of Hico. The owner sued the company to recover the value of the mules, and from a judgment in favor of the plaintiff the defendant has appealed.

The track where the mules were killed was not fenced, but the defendant contended that the place where the accident occurred was within the switch limits in the town of Hico, and that it was under no legal duty to fence its track at that place. In the charge given the jury by the trial judge, the issue whether or not the uses made of the track by the defendant were such as to absolve the defendant from the duty of fencing was left for determination by the jury, with the further instruction that, in the event of a finding that the defendant was not required to so fence its track, then a verdict should be rendered in favor of the defendant unless the evidence showed that defendant's servants in charge of the train were guilty of negligence in other respects proximately causing the death of the mules. The jury were instructed that the defendant was not required to fence such portions of its track as lay between the switch stands and such other parts of the track as were necessary to be used by the employes in uncoupling the cars and in operating the switch stands. This instruction is criticised by appellant as being misleading and confusing, but we think it reasonably sufficient, and this assignment is overruled. Gulf, C. & S. F. Ry. v. Blankenbeckler, 13 Texas Civ. App., 253; Texas & P. Ry. v. Billingsly, 37 S. W., 27.

The court further charged the jury as follows: "The burden is on each party to establish his contention by a preponderance of the testimony." One of the defendant's contentions was that it was not required to fence its track at the place where the accident occurred. The burden to establish this defense by a preponderance of the testimony was upon the defendant, and in another portion of the charge the jury were so instructed. Another contention was that its employes exercised ordinary care to avoid killing the animals. This defense, of course, was a mere negative of plaintiff's allegations that the defendant was guilty of negligence in failing to provide a sufficient headlight and in failing to keep a proper lookout ahead of the train in order to avoid injuring the animals. Of course, the burden was upon plaintiff to establish these allegations of negligence, and the charge quoted was clearly erroneous in that it placed the burden upon the defendant to establish by a preponderance of the evidence the negative of such allegations of negligence on the part of the plaintiff, and this error will require a reversal of the judgment.

The court instructed the jury as follows: 4. "If you find from the evidence that defendant's engine or train did, at or about the time and place alleged in plaintiff's petition, strike and kill or render worthless plaintiff's two mules, and that defendant's track at the place was not fenced, you will find for the plaintiff, unless you further find that on account of the place being within defendant's switch limits defendant was not required to fence its track; in event you find that the defendant was not required to fence its track at that place where the said mules were struck you will find for the defendant, unless you further

find that the agents or employes of the defendant failed to use, in operating defendant's train, such care as a person of ordinary prudence should have used under like circumstances."

5. "If you find that defendant was not required to fence its track at the place where plaintiff's mules were killed you will find for defendant, unless you find that defendant's agents or employes failed to use and exercise such care as an ordinarily prudent person should have exercised under the circumstances; should you find that the track at the said place was not required to be fenced, but further find that defendant's agents or employes did not use such care in providing sufficient headlight or keeping a proper lookout ahead of the train, blow the whistle or ring the bell, or stop the train to prevent the collision, as a person of ordinary prudence would have done under such circumstances, then you will find for the plaintiff."

Appellant complains that in each of the said paragraphs 4 and 5 the jury were instructed that, even though they should find that defendant was not required to fence its track at the place of the accident, plaintiff would be entitled to a verdict if defendant's agents failed to use ordinary care in operating the train, and thus plaintiff's contention was unduly emphasized. It will be noted, however, that in the concluding portion of paragraph 4 of the instruction, that the alleged negligence of the defendant in the operation of its train is merely mentioned as a limitation upon an instruction in favor of the defendant and is not presented as an affirmative instruction to find for the plaintiff in the event defendant's employes failed to exercise ordinary care in operating the train, as the same was presented in the fifth paragraph of the charge. Furthermore, both in the fourth and fifth paragraphs the jury were told, in effect, that defendant would not be liable in the event it was not required to fence its track, unless it was further shown that its employes in charge of the train were guilty of negligence in failing to avoid the accident, and therefore it can not be said in any event that more prominence was given plaintiff's claim than was given to the defense.

The court further charged the jury that if they should find that defendant was not required to fence its track at the place where the accident occurred, but should further find that defendant's agents and employes did not use ordinary care to provide a sufficient headlight, to keep a proper lookout ahead of the train, or blow the whistle, or ring the bell, or stop the train to prevent the collision, then a verdict should be rendered in plaintiff's favor. And in a special instruction requested by the plaintiff the court again submitted the issue of alleged negligence on the part of the engineer and fireman in failing to observe the mules in time to prevent striking them. Appellant contends that there was no evidence to authorize the charge, especially in view of the testimony of the engineer, Wm. Myers, that he had a good headlight, kept a lookout ahead of the engine, and as soon as he discovered the mules upon the track threw on the brakes, blew the whistle and rang the bell. Counsel for appellee have not called our attention to any evidence in the record which would warrant the submission of those issues of negligence, and we have not examined the statement of facts to ascertain whether or not it contains such evidence, in view of

the fact that the judgment is to be reversed and the cause remanded for the error above indicated. However, we suggest that, upon another trial, unless there is some evidence tending to show the negligence charged against the defendant and last above referred to, such a charge should not be given. See Gulf, C. & S. F. Ry. v. Anson, 101 Texas, 198; Texas & P. Ry. v. Shoemaker, 98 Texas, 451; Missouri, K. & T. Ry. Co. v. Baker, 99 Texas, 452.

Plaintiff's special charge No. 1 was also given, reading as follows: "The evidence in this case shows that the track of the defendant at the place where plaintiff's stock were killed was not fenced. Therefore the burden of proof is upon defendant to show that it was necessary to keep the track unfenced at said place; and unless you find from the evidence that it was necessary to keep said track at said place unfenced, then you will find for the plaintiff." In this instruction no guide is given to govern the jury in their determination of what conditions would render it necessary to keep the track unfenced. Appellant does not make this criticism upon the instruction, but we suggest the error contained therein in view of another trial.

By the sixth assignment of error appellant does criticise the special instruction last quoted as giving undue prominence to plaintiff's theory of the case, as the same issue had already been submitted in the main charge. We deem it unnecessary to pass upon the question thus presented, as all such criticisms will, doubtless, be avoided upon another trial. Reversed and remanded.

Reversed and remanded.

L. M. COATS ET AL. v. J. M. BLANDING ET AL.

Decided February 19, 1910.

1.—Local Option Elections—Declaration of Result—Interval of Two Years.

Under the statutes as they now stand, the interval of two years which must elapse between local option elections in the same territory, must be computed from the date of the last order declaring the result. So, when a local option election is contested in the District Court and an appeal taken from the judgment of that court to the Court of Civil Appeals, the interval must be computed from the date of the order of the Commissioners' Court declaring the true result in accordance with the final judgment of the Court of Civil Appeals.

2.—Same—Judgment not Conclusive, when.

A vacated, set aside or reversed judgment, order or declaration is thereby deprived of its conclusive character as such, and can not be made the basis of any rights thereafter.

3.—Same—Constitutional Law.

The Act of 1907 (Gen. Laws, 1907, page 447) concerning local option elections, is not obnoxious to the objection that it is violative of the Constitution because the extension of the time within which a local option election might be contested, is not comprehended in the caption. The caption is sufficient to embrace the subject matter of the Act. Nor does it affect any vested rights with respect to personal or property rights, and is not violative of that provision of the Constitution which forbids the passage of retroactive laws.

Appeal from the District Court of Navarro County. Tried below before Hon. H. B. Davis.

R. S. Neblett and *R. R. Owen,* for appellants.—The court erred in refusing to award the writ of mandamus prayed for by relators. Necessity of publication: Decker v. State, 39 Texas Crim. App., 20; State v. Harvey, 11 Texas Civ. App., 691. Power to make second declaration: Bland v. Orr, 90 Texas, 492; Rev. Stats. 1895, art. 1537; Jones v. Commissioners, 63 Am. St., 711; Act of 1905, 378; Ex parte Smith, 48 Texas Crim. App., 356; Seay v. State, 51 Texas Crim. App., 444; Dawson v. State, 25 Texas Crim. App., 670.

The Act of 1907, p. 446 et seq., in so far as it operates to extend the time for holding subsequent elections, is unconstitutional and void: 1st. Because the extension of time, if the time is extended, is not comprehended by the caption of the Act. 2d. The election of June 15, 1907, being held and completed before the Act of 1907 went into effect, the time for the next election was fixed by the laws in force when the election was held, and the Act can not apply to said election. 3d. The vote cast at the election of June 15, 1907, being cast in view of the law as it existed at that time, the voters of the county have a right to another election in the time provided by the laws then existing, and if the Act does extend the time for the subsequent election it is void and unconstitutional as to prior elections. Dawson v. State, 25 Texas Crim. App., 670; Act of 1907, par. 447; Lawhon v. State, 26 Texas Crim. App., 101; Robinson v. State, 26 Texas Crim. App., 82; Snearly v. State, 40 Texas Crim. App., 507; Ex parte Heyman, 45 Texas Crim. App., 532.

Treadwell & Tarver and *Richard Mays,* for appellees.—The two years that must expire from the date of the declaration of the result of a local option election before a second election can be ordered dates from the final declaration of the result of the former election, made after the true result of the election has been ascertained, in this case from March 9, 1909, and not from June 26, 1907. Rev. Stats., arts. 3390, 3391, 3393 and 3397; Acts 29th Leg., 1905, chap. 158, p. 378; Bowman v. State, 41 S. W., 635; Kidd v. Truett, 28 Texas Civ. App., 620; McCormick v. Jester, 53 Texas Civ. App., 306; Seay v. State, 51 Texas Crim. App., 444; Seneca Mining Co. v. Secretary of State, 9 L. R. A., 770; 23 Cyc., 1130; 19 Am. & Eng. Ency. Law, 513.

BOOKHOUT, ASSOCIATE JUSTICE.—This is a suit instituted in the District Court of Navarro County by appellants, asking for the issuance of a writ of mandamus to compel the appellees, composing the Commissioners' Court of Navarro County, to order an election to be held in Navarro County for the purpose of determining whether the sale of intoxicating liquors should be prohibited in said county.

The undisputed facts are: On December 16, 1904, Navarro County for the first time declared in favor of prohibition by popular vote, and it became effective upon the 1st day of April, 1905. In the spring of 1907 appellants, and others who opposed prohibition, petitioned the Commissioners' Court for another election, which was granted on May

17, 1907, and the election was ordered and held on June 15, 1907. The Commissioners' Court met on the 26th of June, 1907, and upon the face of the returns declared that the election had resulted against prohibition by a majority of twelve votes. Within the time allowed by law, the result of the election so declared was contested. The case was tried in the District Court of Navarro County, and contestants having lost, the case was appealed to this court. The result was that the judgment of the District Court was reversed, and a decision was rendered by this court in favor of contestants, setting aside and vacating the result of the election as it had been declared by the Commissioners' Court as well as by the District Court, and declared that the true result of said election was in favor of prohibition by a majority of eleven votes. This court ordered and directed that its judgment be certified to said Commissioners' Court for their observance. McCormick v. Jester, 53 Texas Civ. App., 306 (115 S. W., 278). In obedience to the mandate of this court the Commissioners' Court, on March 9, 1909, vacated and set aside its declaration made June 26, 1907, and declared the result of said election to be in favor of prohibition by a majority of eleven votes, and caused said declaration to be entered of record and published as directed by law.

The sole question for our determination is: Did the two years which must elapse since the publication of the result of the election of June 15, 1907, begin to run on June 26, 1907, or on March 9, 1909? The declaration of the result, erroneously made by the Commissioners' Court on June 26, 1907, was not conclusive, but was merely prima facie evidence of the result of the election. This is so declared by article 3390 of the Revised Statutes. At most, and undisturbed, it is but a quasi judgment. (Bowman v. State, 41 S. W., 635.) It is a well-settled rule that a vacated, set aside or reversed judgment, order or declaration, is deprived of its conclusive character as such, and can not be made the basis of any rights thereafter. (23 Cyc., 1130.) The facts of this case do not bring it within any of the exceptions to this rule. Title 69 of the Revised Statutes is devoted entirely to the subject of local option elections. In providing for a second election, article 3393, as enacted in 1893, provides, among other things, that "the order granting such elections, as well as that declaring the result, shall, if prohibition be carried, have the same force and effect and the same conclusiveness as are given to them in the case of a first election by the provisions of this title." By the construction placed upon this article the two-year period began to run from the day of the election. But in 1905 this article was amended so as to make "such time date from the time of publication of the last notice" where notices were required; otherwise the time shall date from the declaration of the result. (Acts Twenty-ninth Leg., 1905, chap. 158, p. 378.) The election here involved was held two years after the passage of this statute, and this amended article will, of course, govern. 19 Am. & Eng. Ency. of Law, 513; Seay v. State, 51 Texas Crim. App., 444 (102 S. W., 1127). All of these provisions manifestly have reference to the declaration and publication of the true result. In the very nature of things, it can have no reference to vacated and annulled declarations. It follows that the two years that must expire from the

date of the declaration of the result of a local option election before a second election can be ordered dates from the final declaration of the result of the former election, made after the true result of the election has been ascertained—in this case from March 9, 1909, and not from June 26, 1907.

Again, appellants contend that the Act of 1907, p. 447 et seq., Gen. Laws 1907, is unconstitutional because the extension of time, if the time is extended, within which a local option election may be contested, is not comprehended in the caption of the Act. The Act is entitled, "An Act to simplify trials for the contest of local option elections and to simplify criminal trials that arise under the local option laws by amending article 3397 of title LXIX, Revised Civil Statutes of Texas, providing the time and manner in which local option elections may be contested, prescribing the effect to be given the judgment of the courts in which said election is contested; and provided further, that when no contest is filed as provided in the Act, that the legality of the election and the result as declared shall be conclusively presumed, and shall be binding upon all courts, repealing all laws in conflict with this Act, and declaring an emergency." Article XVI, section 20, of the Constitution, provides that the Legislature shall enact laws whereby voters may "from time to time" determine whether the sale of intoxicating liquors shall be prohibited. In Griffin v. Tucker, 102 Texas, 420, Mr. Justice Williams, speaking for our Supreme Court, says: "The subject is left to the Legislature," and "we can see nothing in the provision (of the Constitution) which affects the plenary powers of the Legislature to regulate the holding of elections . . . ," and that "the framing of the law, so that the right intended to be secured to the voters in the localities may be exercised, is expressly committed to the Legislature, and we must look to the statutes in order to determine as to the validity of such elections . . ." In our opinion, the caption of this statute is sufficient to embrace the subject matter of the Act. Hardy v. State, 52 Texas Crim., 420 (107 S. W., 547); Stockard v. Reid, 57 Texas Civ. App., 126 (121 S. W., 1144). The statute does not affect any vested rights with respect to personal or property rights, and is not violative of that provision of the Constitution which forbids the passage of retroactive laws.

It follows from these remarks that the judgment of the court refusing a mandamus is correct, and the same is affirmed.

Affirmed.

Writ of error refused.

TEXAS & NEW ORLEANS RAILROAD COMPANY v. E. G. BROUILLETTE.

Decided February 22, 1910.

Railroad—Backing Train at Station—Negligence.

In a suit against a railroad company for damages for the death of an infant caused by the backing of a train which had been stopped across a street at or near a station, evidence reviewed and held (1) sufficient to support a finding that the defendant was guilty of negligence in not exercising

ordinary care to ascertain whether its track was clear before backing the train; and (2) that the parents of the child were not guilty of contributory negligence as matter of law in permitting the child to wander from its home and be upon the track.

Appeal from the District Court of Orange County. Tried below before Hon. W. B. Powell.

Baker, Botts, Parker & Garwood and *Parker, Hefner & Orgain,* for appellant.

Geo. E. Holland and *V. H. Stark.* for appellee.

McMEANS, ASSOCIATE JUSTICE.—Suit by E. G. Brouillette against the Texas & New Orleans Railroad Company for damages resulting to plaintiff on account of personal injuries sustained by his minor son, Fred Otis Brouillette, caused by his being run over by a passenger train of defendant at or near its depot in Orange, Texas.

Plaintiff alleged: "That about November 16, 1906, appellant ran one of its passenger trains known as No. 3, or the 'Oriole,' composed of an engine and several passenger coaches, into the city of Orange, and stopped the same near its depot, the engine thereof being at its watering tank, and at which place the passengers alighted from and entered said train. That while said train was in said position it entirely blocked Greene Avenue, a public thoroughfare in the city of Orange, and prevented any travel for the time being thereover, said watering tank being on the opposite side of the street from the depot of defendant hereinbefore mentioned.

"That Fred Otis Brouillette, an infant two years and seven months of age and the son of this plaintiff, was crossing the track of defendant company in the rear of its said train and ten or fifteen feet from the rear thereof, and defendant carelessly and negligently, and without keeping any lookout for persons on its track in the rear of its said train, and without having any persons on the rear of said train for the purpose of keeping a lookout along its track, on said date backed said train upon and over plaintiff's said child and over his left leg, and so injured and mashed same that the same had to be amputated, and was amputated.

"That had defendant kept a reasonable lookout for persons on or near its track it could and would have discovered the peril and position of plaintiff's said child, and would and could have avoided injuring him as aforesaid, but, disregarding its duty, defendant negligently and carelessly at said time and place backed said train over said child, without warning, and without any effort to discover its peril, and without keeping any lookout for persons on its track, and caused him the injury before stated."

Defendant, in addition to other pleas, specially pleaded contributory negligence on the part of plaintiff as well as on the part of the child's mother.

The case was tried before the court without a jury and resulted in a judgment for plaintiff. Defendant appeals.

This is a companion case to Texas & New Orleans Railroad Company v. Brouillette, 53 Texas Civ. App., 33 (117 S. W., 1014), which was reversed by this court for an error in the charge. This case was tried upon the evidence introduced in the trial of the case referred to, except on the issue of contributory negligence of the plaintiff and his wife, and the statement of the case made in our opinion in that case is adopted as a substantially correct statement of this as to the facts immediately attending the injury to the child, and is as follows:

"Fred Otis Brouillette, two years and seven months old, lived with his father in the City Hotel, situated on Green Avenue in the city of Orange, a short distance north of appellant's railroad and depot. On November 16, 1906, about noon, appellant's passenger train, headed west, came into Orange and stopped at the usual place, the engine being at a water tank just west of the depot where it took water. This occupied some four or five minutes. Usually while taking water the passengers alighted and embarked, and baggage was discharged and loaded; but sometimes, when there was a large amount of baggage to be loaded, the train, after taking water, would be backed until the baggage car would be opposite the baggage-room, and the baggage would be loaded from that point. On the occasion in question the large amount of baggage to be loaded required that the train be backed, and in backing it the appellee was run over and injured.

"When the train came into Orange, E. G. Brouillette, father of Fred Otis, was in the City Hotel, and immediately upon the arrival of the train started to the depot, which is situated south of the railway track, leaving Fred Otis with an older brother inside the hotel sitting at the table. The train having stopped across and blocked Green Avenue, and the cars of the train being vestibuled so that he could not pass between them, Brouillette gained the depot by walking eastwardly by the side of the standing train and crossing the track at the end of the rear car. The first seen of Fred Otis, after his father left him in the hotel, was just as the train started to back, and he was then falling upon the track, having been struck and knocked down by the rear end of the rear car of the train. He was then between the rails, but nearest the north rail. The physical facts, as well as the testimony of all the witnesses, tend to prove that the child, at the very moment the train began to back, was standing on the track immediately behind the last car. The presumptions arising from the facts are that the child attempted to follow his father to the depot, taking the same route, and had just reached and gotten upon the track as the train began to back. He was not seen by any witness or by any of the trainmen when he left the hotel, nor while approaching the place where he was hurt.

"The evidence further shows that the greater portion of the city of Orange and appellant's depot were south of the track; that passengers got on and off the train on that side; that all persons having business there when the trains came in transacted it on that side, and that, the train being entirely vestibuled, only the doors on the south side were opened, while those on the north always remained closed, and that the duties of the train operatives directed their attention and activities to the south side, except that of the engineer, who, while his

station was on the right or north side of the engine, on this occasion occupied most of his time while the engine was taking water in oiling his engine. None of the train crew except the conductor knew until the train was ready to start that it would have to be backed for baggage. The conductor motioned to the brakeman to go back and guard the rear of the train and see that the track was clear, and the great weight of the evidence conclusively shows, we think, that the brakeman, in obedience to the signal of the conductor, went to the rear of the train, looked to see if the track was clear, and, seeing no one upon it, swung himself on the platform steps and gave the conductor the signal to back, which was repeated to the engineer, who, after looking back down the train to see if the track was clear on his side, and it appearing that it was, immediately put the train in motion. At the time the brakeman looked at the track we think it clear from the evidence that the child was standing on the track so close to the car as not to be discovered by a person of ordinary care standing at or upon the steps of the car platform where the brakeman stood, but to have seen him it would have been necessary for the brakeman to go behind the car to look to see if any one might be there, or to stoop and look under the car."

The facts introduced upon the issue of contributory negligence will be referred to further on in this opinion.

Appellant's first assignment of error complains, in substance, that the court erred in rendering judgment for plaintiff, because plaintiff had wholly failed to show by any legally sufficient evidence that defendant had been negligent in any of the matters alleged in the petition, but, on the contrary, that the evidence conclusively shows that the child approached defendant's train while same was standing still at the station at Orange, without his approach and position of danger being known to or discovered by any of defendant's trainmen, and under such circumstances that defendant and its trainmen could not properly be held to be negligent in failing to discover the child's approach or in failing to discover its position of danger, and that from the undisputed evidence and the physical facts, taken as a whole, the injury to the child does not appear to have resulted from any negligent act of defendant, or from any omission of duty on its part in any of the particulars alleged in plaintiff's petition.

Under this assignment appellant presents the following proposition: "The uncontroverted evidence shows that, at the time Fred Otis Brouillette was injured, appellant's train had just started in backward motion; the child, at the time the train started backward, being immediately at the rear of the train and upon the north rail of the track, having approached and gotten into such dangerous position while the train had been standing still, and under such circumstances that defendant can not be held to have been guilty of negligence in failing to discover its approach and his position of danger, and the evidence wholly fails to show any negligence upon the part of the railroad company in operating its train at time of the injury to said child. On the contrary, the evidence conclusively shows that the railroad company was exercising at least ordinary care in the op-

eration of its trains at the time of the injury to Fred Otis Brouillette."

We think the assignment can not be sustained. Granting that the brakeman went to the rear of the train before it began to back for the purpose of seeing that no one was on the track close enough to be injured by the moving of the cars in that direction, we have the testimony of the witness Wynne, who swore that just a short time before the train began to back he saw a child, which he afterwards ascertained was Brouillette's, and that it was then on the track about fifteen feet from the rear car; that "when I first saw him he was on the track and looked like, to me, got down to crawl over it. The child was two or three years old and very small, and he started to go back over to the platform towards the depot when the train commenced backing up. I did not see the child when he was actually run over." It was shown that the train stopped at such a place as to completely block Green Avenue, which was the only crossing near the station, and the only recourse left to those who desired to pass along the street while the train was there was to cross the railroad track either in front or to the rear of the train. The street was frequently traveled, and defendant might have anticipated that persons traveling it at such a time would cross the track at one or the other place. Hence, when it was determined to start the train in a contrary direction to that in which it was headed, it was incumbent upon the operatives to use ordinary care to see that some one was not so situated as to be injured by such a movement; and if the testimony of the witness Wynne is true the court would have been authorized to find that the exercise of such care by defendant's employes would have enabled them to discover the presence and danger of the child in time to have avoided the injury to him. It may be that the testimony of Wynne and the other evidence relied upon by appellee to sustain the judgment is opposed by the great weight and preponderance of the testimony, but that is not the assignment of error before us, and, indeed, no such assignment is presented. We do not think that there is an entire absence of evidence in the record to prove actionable negligence on the part of defendant, and the assignment must therefore be overruled.

Appellant's second assignment of error is as follows: "The court erred in rendering judgment for the plaintiff herein, and in not rendering judgment for the defendant, because, as one defense, defendant pleaded specially contributory negligence on the part of plaintiff in failing to protect his child, or to take any precaution to keep him from wandering unattended into a position of danger where he was injured, although plaintiff knew, or should have known from the facts within his knowledge, that without such care or protection his minor son would probably attempt to follow him to the depot and wander into a position of danger about defendant's train; and specially pleaded such facts and circumstances as made it a duty incumbent upon the plaintiff to have exercised such affirmative care or precautions to prevent said child from wandering into the position of danger where he was injured, which, under the facts and circumstances then known to the plaintiff he knew, or reasonably should have known, that

it would probably do, and such negligence of the plaintiff is reasonably shown by the evidence in this case, taken as a whole, and conclusively shown by the testimony of plaintiff himself as contained in the record; and it is further conclusively shown by the testimony of plaintiff himself that he exercised no care and took no precautions to prevent his said child from wandering unprotected into a position of danger where he was injured, although the facts and circumstances known to the plaintiff were such as required of him, in the exercise of ordinary care, that he take suitable precaution and exercise such care and protection to prevent what the facts and circumstances then known to him reasonably indicated would probably occur and which did occur, that his said minor child would attempt to follow plaintiff, his father, over to defendant's depot and into a dangerous position where he was likely to be injured by defendant's train."

A short time after the child was hurt the plaintiff made to the defendant a statement in writing, which was introduced in evidence. Such parts of the statement as are pertinent to the question under consideration are as follows:

"On November 16, 1906, about noon, I left the City Hotel at Orange, which is run by me, and went over to the T. & N. O. passenger depot which is just across the track and south of the hotel. The passenger train No. 3, coming from the East, had just arrived at depot and was standing at depot, the engine at water tank taking water; when I left the hotel I walked out to track on which train was standing, about thirty or thirty-five steps from hotel, and then walked to the east end of train along the north side of it to the rear, and crossed over track opposite the express office, then on down platform, stopping in front of the depot office window; I had only been there a minute or so when the train began to move back slowly, moving east; can't say just what speed train moved back, about one coach length. I can't say whether train had come to a stop or not when I was informed by Robert McGehee that my little two-and-a-half-year-old baby boy had been run over by the train.

"When I left the house to go over to the depot I left my little boy in the dining room, eating dinner, and had no thought of his being out of the house, and the only way that I can account for his being out of the house and upon the railroad track was that he got down from the table and tried or started to follow me. I did not say anything to him or any one else when I started over to depot, and thought that I had run away from him, and that he would not know where I was, and would not try to follow me.

"It is only about thirty steps from the hotel door to the railroad track, the hotel being on the north side of track and depot on south side of track. There is no fence around hotel, and there was nothing to prevent him from coming out of hotel and over to track.

"The child was born where I now live, and was perfectly used to the trains, and had been warned about going upon the tracks; was afraid of the trains when they were moving. He would sometimes go out on the tracks and over to the depot, but that was when there were no trains on the track.

"There is only one track at the depot, and that is the main line, and a great many trains pass by going each way, both day and night.

"It was no one's special duty to mind the baby—all felt it was a part of their work; and this being the noon hour, all were busy in the kitchen and dining room.

"If any of the family or any one else saw him leave the hotel, I have not heard of it, and I am sure they did not."

The plaintiff testified on the trial as follows: "The baby was eating his dinner with his little brother in the kitchen when I left the hotel to go over to the depot to see about the trunk. I was not at the table at all; the baby was eating his dinner in the kitchen. I and the baby were both in the kitchen when the train came in, and the baby stayed there, and I left him there when I left. I didn't think that the baby saw me when I left to go over to the depot. I am sure that the baby did not come out ahead of me. Freddie must have followed over close after me.

"Freddie often would go with me; I would often take him around with me, and I would often take him over to the depot with me, too. He was in the habit of following me around when I wasn't going very far. He would follow me anywhere if I would let him do it; he has always been that way ever since he was able to walk; he would follow me anywhere I was going.

"When I left Freddie in the kitchen there and went off, I didn't say anything to him about where I was going. I didn't say anything to any one about where I was going. I think that Freddie's mother was in there when I left; I don't remember for sure. I did not say anything to her about where I was going, nor I didn't say anything to any one else about watching the child after I was gone.

"I went over to the depot several times a day to meet the trains; the trains came in there frequently, and I went over there to meet them, and often Freddie would follow me over there, or I would take him along. I have taken him over there with me a number of times.

"Freddie may have seen me go over there to the depot; I don't know whether he did or not; I didn't think that he saw me when I left. He knew that I was in the habit of going over there to meet the trains. Freddie generally followed me—never noticed him following any one else.

"The child, at the time I left him to go over to the train, was in the house—the room right back in the house; he was in one of the rear rooms of the house. To come out of the house from where he was you would have to come out through the dining room and office, and come out that way. The doors were not closed at that time; I think that the doors were open. I think Freddie's little brother was in the kitchen at the same time, and I think my wife was there; I don't think we ever talked about it, as to whether she was there or not, but I think that she was there in the kitchen. They had been eating dinner just a short time; the children had just come from school; Freddie didn't go to school; his little brother did, and I think that Freddie was eating dinner with him.

"We went and got the child several times when the trains would be passing; that was no unusual thing to go out and get him or see

where he was. We did not let him generally play and not pay any attention to him; we never did let him play there by himself—that is, if we saw him. I don't know how often I did go and get him and take him back when he was over there by the depot; I don't reckon I did it as much as a dozen times; he might have been there several times. I think that I have gone myself and got him; I have never seen any one else do it; I heard some of them say that they did; they said they got him from off the tracks and brought him into the house. I don't remember whether I know of more than one person that got him off of the track and brought him back in the house, or not; I can not remember about that. That was some time before it happened. The child was out there by himself when I went and got him. It was not one of the family that I heard brought him from the tracks; it was some one else other than the family.

"The way the City Hotel is located the child could come out through the office and through the front door and out on the gallery—there wasn't any fence—and walk right out to the public road or across to the depot, or to where the child was hurt, without opening any doors or anything of that kind. There is a street on two sides of the house, and the hotel is about northwest of the depot. The child could walk around like any one else."

Mrs. Brouillette, the mother of the child, testified as follows: "I remember the day of the accident. I last saw Freddie in the kitchen, right by my side, eating dinner; he was there at the time his father left the room. I did not see Freddie leave there at all. I was right there in the kitchen; it was twelve o'clock, and I was fixing dinner to put on the table. We keep boarders, and it was time for the boarders to come in and eat dinner. I didn't have any other help except myself and my daughter. I don't think that we had any more boarders than six at that time. We had some transients once in a while, not very often.

"The kitchen is the last room in the north end. To get from where Freddie was to the front door you would have to go through the dining room and office, and go through the hall, too; there are two ways. I am sure it wasn't over four or five minutes after Mr. Brouillette left before Freddie must have left. He, Freddie, was sitting down on the floor eating dinner with his little brother at the time his father left.

"At the time Freddie was hurt his little brother had just finished eating dinner and was ready to go back to school. His little brother was eight years old. It seems to me that I had seen Freddie a few minutes before his little brother left for school. I am under the impression that Freddie went out after his little brother left for school.

"I had no idea that the child had left the room when he got hurt; I saw him a minute or two before, and he was quiet and content at that time; he was always in the kitchen at that time, right by me—just happened to slip off that day. I did not know he had slipped off until he was brought in. I did not know anything about his undertaking to go to the depot and exposing himself to danger.

"The last time I saw the baby he was in the kitchen, eating his dinner. I couldn't tell you just how long it was before then and

when my husband brought him in in his arms, but I would guess about ten minutes. I don't know when my husband left. I couldn't tell you whether my husband was there the last time I noticed Freddie in the kitchen before he was hurt, or not; I didn't even know my husband was gone. I am sure that I saw Freddie in the kitchen eating his dinner four or five minutes before my husband came back.

"Of course, I did not have my eye on the child all of the time, ordinarily. He played around pretty much as he pleased on the front porch and in the side yard. We have got a small yard there on the north side of the house, with a fence around it—not on the back of the house, but on the side; not the side next the street, but the other side. The road runs on two sides of the house, or the street does; the street runs on the south side and the west side, but there is no street on the north side, and that is where the yard is. When you come out the front door there is the railroad in front, and there is a street on the other side and in the back, and there is no fence around those sides, and the children could play around as they saw fit, ordinarily.

"Mr. Brouillette, immediately before he went over to the depot, was sitting down on the front porch. At the time he left, or about that time, he was sitting on the front porch. He did not come in the kitchen and tell me where he was going, nor I had not seen him in the kitchen; if he came in there I didn't see him. The last time I saw him he was on the front porch, and the last time I saw Freddie he was in the kitchen eating his dinner."

From this testimony we can not say that plaintiff was guilty of contributory negligence as a matter of law in respect to the matter complained of in the assignment. Houston City Street Ry. Co. v. Dillon, 3 Civ. App., 303.

No reversible errors are pointed out by the assignments. The judgment of the court below is affirmed.

Affirmed.

Writ of error refused.

WILLIAMS LAND COMPANY v. H. V. CRULL.

Decided February 22, 1910.

1.—Action Against Partnership—Final Judgment.

In a suit against a partnership the petition gave the names of the two persons composing the partnership; both of said persons filed an answer; the judgment was against the partnership, reciting that it was composed of the persons who were alleged to compose the partnership and who had answered. Held, the judgment was not subject to the objection that it was not final in that it did not dispose of all the parties before the court.

2.—Action on Express Contract—Charge on Quantum Meruit.

Where an action is based on an express contract, a charge permitting a recovery on quantum meruit is reversible error.

3.—Practice—Erroneous Charge.

An erroneous charge in favor of appellee is cause for reversal unless it affirmatively appears that it did not influence the jury.

Appeal from the County Court of Sherman County. Tried below before Hon. O. J. Ingham.

R. E. Stalcup and *Hyde & Harris,* for appellant.

C. F. Rudolph, for appellee.

SPEER, ASSOCIATE JUSTICE.—This is an action by H. V. Crull, a real estate broker, to recover certain commissions from Williams Land Company, a copartnership composed of W. A. Williams and Clark Marshall, for making a sale of certain real estate in Sherman County. The action was based upon an express contract to pay five percent commissions upon the sale price, amounting, it was alleged, to six hundred and eight dollars. There was a trial before a jury, resulting in a verdict and judgment for the plaintiff in the sum of five hundred dollars, from which the defendants have appealed.

At the threshold of the discussion of this case we are confronted with the question whether or not the judgment entered below was such a final judgment as to support this appeal. The judgment follows the verdict, and the material part is as follows: "It is therefore ordered, adjudged and decreed by the court that the plaintiff do have and recover of and from the defendant, the Williams Land Company, a copartnership composed of W. A. Williams and Clark Marshall, the sum of five hundred dollars with interest on said amount at the rate of six percent per annum from date of this judgment, together with all costs in this behalf expended, for which let execution issue." Appellants insist that the verdict and judgment do not dispose of all the parties before the court, being in form against the copartnership only.

In Frank v. Tatum, 87 Texas, 204, it is held by our Supreme Court that, where the members of a defendant firm were dismissed from the suit, the court thereafter had no authority to render a judgment against the copartnership. This was upon the reasoning that a copartnership under our law is not a person, either natural or artificial, capable of suing or being sued as such. To the same effect is the decision in Glasscock v. Price, 92 Texas, 271. While it is true that a copartnership under our law is not a legal entity or a legal person distinct from its members, it does not follow from this that the judgment under consideration is not a final disposition of the individual members of the firm of Williams Land Company. A partnership under our statute (article 1224 et seq.) must be sued through its individual members. In the present case the suit was against the partnership composed of W. A. Williams and Clark Marshall, both of whom filed an answer in court. The judgment against "Williams Land Company, a copartnership composed of W. A. Williams and Clark Marshall," can be nothing else than a judgment against the individuals composing that firm. Patten v. Cunningham, 63 Texas, 666; Fernandez v. Casey & Swasey, 77 Texas, 452; Blumenthal v. Youngblood, 24 Texas Civ. App., 266 (59 S. W., 290). We conclude, therefore, that the judgment disposes of all the parties to the suit, and, being thus final, is appealable.

We will not discuss those assignments complaining of the court's refusal to grant a new trial, since the judgment must be reversed and the cause remanded for an error in the charge. As stated above, the action was based upon an express contract to recover five percent

commissions for making a sale of real estate. In the third paragraph of the court's charge the jury were instructed in effect that appellants would be liable to appellee if they should find that no amount was agreed upon, but that "the amount so demanded by plaintiff is not in excess of a reasonable compensation for such service." This, we think, clearly authorized a recovery as upon a *quantum meruit*, and as such was not authorized by the pleadings. Frey v. Klar, 69 S. W., 211; Fordtran v. Stowers, 52 Texas Civ. App., 226 (113 S. W., 631). It is difficult to account for the verdict upon any other theory than that the jury based the award upon this charge. But, independently of that consideration, we would yet reverse for the error unless it appeared affirmatively that no such result followed.

For this error the judgment of the County Court is reversed and the cause remanded for another trial.

Reversed and remanded.

Galveston, Harrisburg & San Antonio Railway Company et al. v. W. M. Noelke.

Decided February 23, 1910.

1.—Evidence—Opinion—Hypothetical Question.

Witnesses should not be permitted to give their opinions in answer to hypothetical questions which embrace facts not supported by the evidence.

2.—Evidence—Opinion.

A witness who testified that he could not, after four years, remember the exact words of his conversation with plaintiff, may still be permitted to state that he did not make a certain statement or give a certain promise at that time.

3.—Damages—Charge—Transportation of Cattle.

Damages being claimed for injury to cattle both by failure to furnish cars at the time agreed and by delay and bad handling in their transportation, an instruction which made the measure of damages in case of recovery the difference between the value at destination when delivered and the same at the time they should have been delivered according to contract, was erroneous in permitting a recovery of damages under both issues upon proof sustaining either.

4.—Damages—Pleading—Charge.

Where there is proof of damages in excess of those alleged, recovery should be limited by the instructions to the amount pleaded.

5.—Transportation of Live Stock—Loss of Market.

Where delay in transportation of live stock to market was claimed to have caused loss by decline in the market, defendant was entitled, upon proof making such instructions appropriate, to a requested charge disallowing such decline from the market price of a previous day if the cattle, transported in proper time, would not have reached destination in time to be put on the market on that day.

Appeal from the District Court of Bell County. Tried below before Hon. John M. Furman.

Baker, Botts, Parker & Garwood, R. J. Boyle, Coke, Miller &

Coke and *Tyler & Tyler,* for appellants.—The hypothetical question was not based upon facts in evidence. Texas & P. Ry. Co. v. Leggett, 44 Texas Civ. App., 297.

When a witness can not remember the exact words of a conversation he should be permitted to state the substance thereof, or "where the defect is a failure to remember the exact words or forms of expression, while the impression or idea conveyed is distinct and clear, the evidence should be admitted." Texas & P. Ry. Co. v. Barron, 4 Texas Civ. App., 546.

The charge authorizes a recovery of all damages resulting both from failure to furnish cars and from delay and careless handling in transportation, if the jury found defendants liable on either issue, and is therefore clearly erroneous. International & G. N. Ry. Co. v. Startz, 42 Texas Civ. App., 85.

On loss of market by delay: Waco Artesian Water Co. v. Cauble, 19 Texas Civ. App., 416; Galveston, H. & S. A. Ry. Co. v. Becht, 21 S. W., 971; Simpkins on Contracts & Sales, 265, and authorities cited.

John B. Durrett and *Hill & Lee,* for appellee.—Whether the hypothetical question stated the facts in evidence correctly or not was a question of the weight of the testimony to be passed upon by the jury and not one of admissibility.

The objection to the questions that they called for a conclusion of law, was a valid one and the court did not err in sustaining it. The question as to whether a promise was given was equivalent to the question as to whether a contract was made and was for the jury to decide from the evidence showing what was said by the parties to the alleged contract.

The charge complained of is not subject to the objections urged by appellant for the reason that the court throughout the entire charge treated plaintiff's cause of actions as a whole and placed the burden of proof upon him to establish the liability of defendant, both for delay in furnishing cars and for delay in transportation, before he could recover; and under said charge it was necessary for the jury to find defendant negligent in both particulars before they could find for plaintiff.

KEY, ASSOCIATE JUSTICE.—The following statement of the nature and result of this suit contained in appellants' brief is acquiesced in by appellee: "This was a suit by W. M. Noelke, instituted in the District Court of Bell County, December 15, 1905, against the Galveston, Harrisburg & San Antonio Railway Company, the San Antonio & Aransas Pass Railway Company, the Missouri, Kansas & Texas Railway Company of Texas, and the Missouri, Kansas & Texas Railway Company, alleged by plaintiff to be partners, to recover damages for breach of an alleged contract to furnish seventeen stock cars at Standart, Texas, a station on the line of the first named defendant, on June 9th, 1904, for a shipment of 412 head of beef cattle from said station to National Stock Yards, Illinois, for alleged negligent failure to furnish said cars until June 17, 1904, and for

alleged negligence in handling and unreasonable delays in the transportation of said cattle, whereby it was alleged that they were damaged by loss in weight, by bad appearance, and by fall of the market, in the sum of $2,343.28, which amount was by plaintiff's first amended original petition, filed November 3, 1908, increased to $4,120, and whereby it was alleged that the plaintiff had been further damaged in the sum of $500, the alleged expense of holding said cattle at Standart awaiting the arrival of said cars.

"The defendants jointly plead the general denial, the statute of limitation of two years in bar of the additional damages set up in the first amended original petition, and further plead the several stipulations in the written contract of shipment, among them: (1) The provision exempting the defendants from liability for damages for loss, injury or delay not resulting from their negligence or that of their employes. (2) The stipulation that the shipper would load, unload, feed, water and attend to his stock at his own risk and expense. (3) That any person accompanying said stock, being furnished transportation by defendants, was the agent of the shipper during the transportation of the cattle, and that upon said contract defendants issued passes to William Noelke, W. H. Dockery, A. Vaughan and D. R. Bourland. Further, the defendants plead that at the time plaintiff applied for cars he was notified of the great press of business and scarcity of cars existing, and was advised not to bring in his cattle until the cars were in sight.

"By his supplemental petition plaintiff plead general denial, and, under oath, that the live stock contract alleged by defendants was without consideration.

"Trial before a jury resulted on November 26, 1908, in a verdict and judgment for plaintiff against defendants jointly and severally for $4,031.65. Defendants in due time filed their motions for new trial, and thereafter amended motions, which were presented to the court and overruled, whereupon defendants excepted and gave notice of appeal, and said appeal having been duly perfected, the cause is before this court for review."

The sixth assignment of error is addressed to the action of the trial court in overruling appellants' objection to a hypothetical question to the witness E. B. Baggett, and his answer thereto. The question and answer referred to read as follows:

"Q. To make a hypothetical case to you, 412 steers of beef cattle, grass-fed cattle, are topped from a 6000 bunch, and the steers, sixty or seventy of them, ranging from six to eight years old, and the others four to five years old, what effect would it have on that class of cattle to be held in a small trap eight days, awaiting shipment, then loaded on the cars and run forty to forty-three hours, without feed or water, then fed, watered and rested, reloaded upon the cars and run from fifty to fifty-eight hours without feed, water and rest, and reaching their market, being one day longer than the ordinary transportation of such cattle, what, in your opinion, would be the aggregate loss in weight upon that class of cattle?

"A. My idea would be, all the way from 140 to 200."

The question was objected to, among other reasons, because the

testimony did not support the hypothetical question. That objection should have been sustained, because the testimony fails to show that the cattle were carried fifty to fifty-eight hours without feed, water and rest. On the contrary, the undisputed testimony shows that the run referred to was made in a little over forty-three and less than forty-four hours.

The seventh assignment complains of the ruling sustaining objections to certain questions propounded by appellants to the witness W. S. Whitworth. The bill of exceptions reads as follows:

"Plaintiff having testified that Mr. W. S. Whitworth, acting for defendants, contracted on June 5, 1904, to furnish seventeen cattle cars to plaintiff, at Standart, Texas, on June 9, and plaintiff himself having testified that he requested cars of Mr. Whitworth on June 5, and that Mr. Whitworth answered, 'All right, you can have the cars,' and the witness Whitworth having testified that on June 5 he had orders on file for a great many more cars than were in sight on his division, and having further testified that he could not (four years later) remember the exact words of his conversation with plaintiff, aforesaid, upon which this suit is mainly founded, was asked by defendants' counsel the following questions:

"Q. I will ask you, in case you had not the cars in sight on your division, or knew exactly where you were going to get the cars, did you ever promise Noelke, or any other shipper, to deliver cars on that particular, or any particular, dates?

"Q. Can you state positively whether or not you ever promised Mr. Noelke to put those cars at Standart on the 9th?

"Q. Did you ever say to Mr. Noelke, or anyone else, unless you had the cars in sight, that you would furnish cars to be loaded on any particular day or date?

"To each of the questions plaintiff objected, upon the ground that the question called for a conclusion of law; which objections were sustained by the court, and the witness not permitted to answer said questions, and the questions and testimony excluded from evidence, to which ruling of the court, defendants, by attorneys, then and there excepted.

"That had witness been permitted, he would have testified, in answer to said questions, that he did not state to Mr. Noelke that cars would be furnished at Standart on the 9th of June, and that he never, in his whole experience, stated to a shipper that cars would be furnished on any particular date, unless the cars were at that time in sight on his division."

It will be noted that the testimony was objected to on the ground that it was a conclusion of law. Most assuredly, that objection was untenable. The answer which the bill shows the witness would have given would not have embodied, asserted or intimated any conclusion of law. But, in order that no misapprehension may exist concerning the admissibility of the testimony, we deem it proper to state that our ruling would have been the same if the testimony had been objected to upon the ground of being a conclusion of fact or the witness's opinion relating to a certain matter. When a contract is not in writing, or when, in any other respect, the rights of the liti-

gant depend upon whether or not a particular person made certain statements on a particular occasion, if the person referred to is offered as a witness, and states that he can not remember exactly what was said, it is competent for such witness to state whether he did or did not use the language attributed to him. It may be conceded that such testimony in a sense embraces the opinion or conclusion of the witness, but it should not be excluded for that reason. As shown by Professor Wigmore in his valuable treatise on Evidence, nearly all oral testimony involves inferences or conclusions of the witness. In a prosecution for theft the alleged owner is permitted to testify that the property belongs to him, while, as a matter of fact, it may belong to some other person. The answer which he gives embodies conclusions drawn by him from certain other facts, and from his opinion of the law applicable to such facts. Nevertheless, his testimony, stating that he is the owner of the property, while not conclusive, is properly admitted as testimony. Furthermore, there is another class of cases in which it is admissible for a witness to give his opinion—when he states the facts upon which it is based, and the testimony under consideration comes within that rule. If a witness should be asked whether or not, on a certain occasion, he had repeated a certain poem, it would be competent for him to answer that he had not, because he had never read or heard of the poem referred to and could not repeat it.

The plaintiff sought to recover damages for injuries sustained by his cattle and also the expense incurred by him in holding the cattle while awaiting the arrival of the cars at Standart. Thus it will be seen that the jury might have found for him upon one issue and against him upon the other. If they found for him for injuries sustained by the cattle, and against him upon his right to recover expenses in holding the cattle, his measure of damages should have been limited to compensation for injury to the cattle, yet the court instructed the jury as follows: "If you find for the plaintiff, you will assess his damages at such sum as the evidence may show will justly and fairly compensate for such damages as are the direct and proximate result of defendants' negligence, if any, and in assessing damages as to shrinkage, loss of weight and looks and value in said cattle, the measure of damages which you must observe is the difference, if any, in the market value of the said cattle at the point of destination at the time when they were delivered, and the market value of said cattle at the time they should have been delivered according to the contract at the said place of destination, and you may also take into account any reasonable and necessary expense which the evidence may show, if any, was incurred by plaintiff in holding and caring for said cattle while awaiting the arrival of said cars at Standart."

We sustain appellants' first objection to that charge, which is, it authorized a recovery of all damages resulting both from failure to furnish cars and from delay and careless handling in transportation, if the jury found appellants liable upon either issue, and is therefore erroneous.

This charge seems also to be subject to the further criticism that

it did not limit the right to recover for expenses to those alleged in the petition, there being testimony tending to show more expense than the plaintiff sought to recover.

The tenth and twelfth assignments of error complain of the refusal of the following instructions requested by appellants:

"If you find that plaintiff's cattle were delayed in transit, and that a portion of the delay was unavoidable, and a portion due to the negligence of the defendants, but that had they not sustained the negligent delay, they would still have reached the stock yards in East St. Louis after market hours of the 21st of June, 1904, then plaintiff is not entitled to any damages for delay of this shipment in transit."

"If you believe from the evidence that cattle shipments transported over defendants' lines with the usual dispatch from Standart, Texas, reach the St. Louis market too late to be sold on the fourth day, after leaving Standart, then you are charged that the condition of the St. Louis market on the 13th day of June, 1904, is immaterial in this case, and you will not consider any evidence introduced to show the condition of said market on June 13, 1904."

These charges announce correct propositions of law upon points not as fully covered by the court's charge; and, there being testimony tending to support the theories to which they relate, the trial court should have given them.

There are other assignments of error, presenting many other questions of law, which we deem it unnecessary to consider at length in this opinion. Suffice it to say that we rule against appellants on all other questions, and hold that no errors have been pointed out other than those discussed in this opinion, and for which the judgment is reversed and the cause remanded.

Reversed and remanded.

SHRIMPTON MANUFACTURING COMPANY v. SAM BRIN.

Decided February 23, 1910.

Contract—Sale—Mistake.

A merchant ordered from manufacturers 11,000 cards of needles with his advertisement printed on the cards. Before filling it, the latter, sending him a copy of his order, requested him to check it over carefully and make any changes or corrections desired, to which he replied: "I have checked this all over carefully and find it correct in every particular." Held that the purchaser was bound to accept and pay for the quantity ordered, though he intended and understood the order to be for 11,000 needles and not for 11,000 cards of needles.

Appeal from the County Court of Brown County. Tried below before Hon. A. M. Brumfield.

Jenkins & McCartney, for appellant.—The evidence wholly failing to show any fraud on the part of the plaintiff, it is not responsible for any mistake made by the defendant, and judgment should be rendered for plaintiff. Shrimpton v. Brice, 15 So., 452; Bevins v.

Coates, 96 S. W., 585; James v. Dalbey, 78 N. W., 51; Brown v. Levy, 29 Texas Civ. App., 389; Beck v. Pauli Lith. Co., 16 So., 523; Davis v. Stone, 131 Mass., 384; Cabot v. Winsor, 1 Allen, 546; 9 Cyc., 774; Page on Contracts, sec. 64; Curtis v. Kelley, 24 Texas Civ. App., 540.

Harrison & Wayman, for appellee.—Appellant knew that appellee understood its offer in a different sense from that in which it was made, and without explanation permitted him to accept under this erroneous impression, and there was, therefore, no meeting of the minds of the parties and consequently no contract. Shrimpton v. Rosenbaum, 63 N. W., 1011; Clark on Contracts, 303; 9 Cyc., 396; Shook v. Puritan Mfg. Co., 8 L. R. A. (N. S.), 1043; Shrimpton v. Netzorg, 62 N. W., 343; Kendrick v. Life Ins. Co., 70 Am. St. Rep., 596; 2 Paige on Contracts, 1127; Inman Mfg. Co. v. American Cereal Co., 8 L. R. A. (N. S.), 1141.

FISHER, CHIEF JUSTICE.—Whatever uncertainty there may exist in the order referred to in the statement of facts as Exhibit "A" was removed by the letter addressed to appellee, known as Exhibit "C" in the statement of facts, and set out on page 8, in which letter the appellee was requested to check over carefully and make any changes that he may desire, and if correct, sign and return to the appellant. Appellee wrote under this request to the effect that "I have checked this all over carefully and find it correct in every particular," and signed the same and forwarded to appellant. It is clear from the terms of that letter that this was required to be done in order to complete the order for the needles, and we take it and construe it to be a part of the original order. This order is explicit in calling appellee's attention to the fact that the contract called for 11,000 gold-eyed needle cards, and there is no uncertainty and ambiguity in its terms. Holding it to be a part of the contract, the appellee can not avoid its effect unless he was misled and deceived in executing and signing it. He admits that he read a part of the order, but did not read it all. The appellant made no representation to him as to its contents, nor did the appellant make any statement calculated to induce him not to read it and fully inform himself of its contents. Of course, there are cases to the effect, like American F. L. Mortgage Co. v. Pace, 23 Texas Civ. App., 222, that a party is not always guilty of negligence in not fully informing himself of the terms of the contract; or he would not be estopped from asserting that the contract was different from that as written where he has been misled or representations made that would induce him not to read it, but there is nothing of the kind in this case. The contract being clear and explicit, he can not be relieved from its effect merely by the claim that he was mistaken in the order, or did not intend to buy 11,000 cards of needles, but his intention was merely to purchase 11,000 needles. There is no evidence tending to show that appellant was aware of such intention upon the part of appellee, or that the appellee had executed the order under the mistaken belief

that it only called for 11,000 needles. In fact, upon the contrary, the last instrument referred to specially requested him to read it over carefully and to correct any mistake. He replied to that and stated, "I have checked this all over carefully and find it correct in every particular." This case is very similar to that of Coates v. Early, 24 S. E., 305.

Entertaining these views, we are of the opinion that the judgment of the trial court should be reversed and here rendered in favor of appellant for the amount sued for.

Reversed and rendered for appellant for amount of debt and interest.

TEXAS & PACIFIC RAILWAY COMPANY v. J. D. JOHNSON.

Decided February 23, 1910.

1.—Collision at Crossing—Contributory Negligence.

Evidence in case of plaintiff who drove upon a railway crossing after discovering an approaching train, assuming that he had time to cross, and not looking further to discover the distance of the train, considered and held to show contributory negligence precluding him from recovery.

2.—Same—Omission of Signals.

Where the plaintiff, injured by collision with a train at a crossing, had otherwise knowledge of its approach, the fact that signals for the crossing were omitted was immaterial.

Appeal from the County Court of Mitchell County. Tried below before Hon. W. B. Crockett.

Ed. W. and *R. G. Smith,* for appellant.—A person with the full knowledge of the rapid approach of a train who undertakes to go across a crossing in front of it without looking or listening to ascertain whether or not same is dangerously near, is guilty of contributory negligence.

On duty to look and listen: Galveston, H. & S. A. Ry. Co. v. Bracken, 59 Texas, 74; Galveston, H. & S. A. Ry. Co. v. Porfert, 72 Texas, 344; Galveston, H. & S. A. Ry. Co. v. Kutac, 72 Texas, 643; International & G. N. R. Co. v. Graves, 59 Texas, 331; Turner v. Ft. Worth & D. C. Ry. Co., 30 S. W., 253; Sabine & E. T. Ry. Co. v. Dean, 76 Texas, 73; Texas & P. Ry. Co. v. Fuller, 5 Texas Civ. App., 660; Gulf, C. & S. F. Ry. Co. v. Moss, 4 Texas Civ. App., 318.

On immateriality of giving statutory signals: Houston & T. C. Ry. Co. v. Nixon, 52 Texas, 28; Central Texas Ry. Co. v. Nycum, 34 S. W., 460.

On peremptory instruction: Galveston, H. & S. A. R. Co. v. Ryon, 80 Texas, 59.

No briefs for appellee on file.

RICE, ASSOCIATE JUSTICE.—Appellee brought this action against

appellant to recover damages for personal injuries sustained by himself and wife, and also for injury to his horses and wagon, alleged to have been caused by reason of having been struck by one of defendant's passenger trains on a public crossing in the town of Colorado.

Appellant answered by general demurrer, special exceptions and plea of contributory negligence, to the effect that plaintiff, with knowledge that the train was approaching, negligently drove upon the track and was injured.

There was a jury trial, resulting in a verdict and judgment for appellee, from which this appeal is prosecuted.

There are numerous errors assigned, but, in the view we take of this case, it will only be necessary to consider two of them; the first of which is, that the court erred in failing to give a peremptory instruction in behalf of appellant; and the second is that the court erred in overruling appellant's motion for a new trial on the ground of the insufficiency of the evidence. It will therefore be necessary to make a statement of the salient features of the evidence as regards the plea of contributory negligence set up by appellant.

On the night of January 20, 1906, appellee and his wife were returning home from the town of Colorado, and it was necessary, in doing so, to cross defendant's tracks, which ran east and west through the town. They started from the northern part of the town, traveling a road that ran north and south across the tracks. The track just east of the crossing was on a curve, bending north, but as it neared the crossing it became straight. The curve began immediately east of the crossing and extended east something like 300 yards, and the train that struck plaintiff's wagon was coming from the east towards the crossing. A person at or near this crossing, it was shown, could see the headlight of an engine at least from three-quarters to a mile approaching from the east, but the light from the engine would not be cast over the crossing during the whole distance, because when the engine struck the curve which inclined to the north, it would throw the light on the prairie south of the crossing. Plaintiff and his wife both testified that before they got to the crossing they heard the whistle blow and saw the headlight, which they then took to be about the salt works, some mile from the crossing; that it was a passenger train and was running from forty to fifty miles an hour, and that while they knew the train was rapidly approaching the crossing, they did not look or listen for it before driving upon the track, and the inference is strong that if they had done so they could have discovered its dangerous proximity; that as they drove upon the track they looked up and saw the headlight just coming around the curve, when they whipped up the team for the purpose of escaping, but the train was so near and approaching so rapidly that it struck the hind wheel before they cleared the track, upsetting the wagon, throwing them out, injuring both of them, as well as the wagon and the horses. There was a signal post shown to be just about where the curve starts in, some 200 feet east of the crossing; and there was a conflict in the evidence as to whether or not the whistle was blown when passing the signal post—the employes of

appellant testifying that it was, while the plaintiff and his wife testified that it was not. Both plaintiff and his wife testified that the bell was not rung when the train came to the crossing where the accident occurred. It was alleged and shown that the track at the crossing was in bad condition, the rails extending from four to six inches above the surface of the ground, which had not been filled in, and that this condition had existed for several months prior thereto, and it was hard for a wagon to pull across the track in this condition. But it was also shown that appellee was familiar with the track at this point, crossing it every day during the time that it was in this condition.

There is also evidence to the effect that on the night of the accident plaintiff's wife said, in the presence of several witnesses, who testified both for them and for the company, that she told her husband not to drive upon the track in front of the train, and that if he had listened to her the accident would not have occurred. She testified, however, that if she made this statement she had no recollection of it, and the plaintiff himself, in effect, denied the making of this statement. She testified: "When we got to the crossing on this night, and before we started on the crossing, neither Mr. Johnson nor myself stopped and looked and listened." They each testified that they thought they had plenty of time to cross all right; that when they first saw the headlight it was not shining directly on them, but the reflection was on the prairie, south of the track.

A witness for the defendant testified that he was riding along right behind appellee and his wife at the time of the accident; that he did not cross the track in front of the train; that he saw it coming for a half or three-quarters of a mile before it got to the crossing, and saw it all the way from the salt works, which is some three-quarters of a mile, to the crossing; that the night was dark; that he heard the plaintiff's wagon in front of him, but did not see plaintiff. The engineer testified that he did not discover plaintiff or his wagon until they had turned the west end of the curve near the crossing, at which time it was impossible to stop the train, which was running at some thirty-five miles an hour; but since the town of Colorado was unincorporated, no point can be made as to the speed of the train.

This evidence on the part of plaintiff, it seems to us, establishes without question the fact that plaintiff and his wife, before driving upon the track, knew that a passenger train was rapidly approaching them, and evidently knew of the danger and hazard of attempting to cross the track. They failed to look or listen, and if they had done either, in our judgment, they would have ascertained that the train was too near the crossing to admit of a safe passage over it. This failure on their part, in our opinion, constitutes such negligence as will preclude their recovery. Justice Willie, in discussing a similar question in Galveston, H. & S. A. Ry. Co. v. Bracken, 59 Texas, 74, says: "Everyone about to step upon a railroad track must 'listen and look before attempting to cross, in order to avoid an approaching train, and not walk carelessly into the place of possible danger.' Chicago, R. I. & P. R. R. Co. v. Houston, 95 U. S., 702.

'Failure to do so is not merely an imperfect performance of duty, but an entire failure of performance, which will bar his right to recover damages, if it contributed proximately to the injury.' North Pa. Ry. Co. v. Heileman, 49 Pa. St., 60. A person who voluntarily exposes himself to such dangers as this, from which he might have saved himself by the proper use of his senses, contributes directly to his own death, and no cause of action lies for the injury." See also the following cases: Galveston, H. & S. A. Ry. v. Porfert, 72 Texas, 344, 10 S. W., 208; Galveston, H. & S. A. Ry. v. Kutac, 72 Texas, 643, 11 S. W., 130; International & G. N. Ry. v. Graves, 59 Texas, 331; Turner v. Ft. Worth & D. C. Ry., 30 S. W., 253; Sabine & E. T. Ry. v. Dean, 76 Texas, 73, 13 S. W., 45; Texas & P. Ry. v. Fuller, 5 Texas Civ. App., 660, 24 S. W., 1090; Gulf, C. & S. F. Ry. v. Moss, 4 Texas Civ. App., 318, 23 S. W., 475.

There is no merit, we think, in the contention that there was a failure on the part of the employes of the company to blow the whistle at the signal post, if they did fail so to do, because it conclusively appears from appellee's testimony that he and his wife had knowledge of the fact that the train was coming. The whistle was only intended to notify persons of the approach of the cars, and since it is shown that they had this knowledge otherwise, it was immaterial whether the whistle was blown or not. See Houston & T. C. Ry. v. Nixon, 52 Texas, 28; Central Texas Ry. v. Nycum, 34 S. W., 460.

Believing that the trial court erred in refusing to instruct a verdict in behalf of appellant, as well as in refusing a new trial, its judgment is reversed and here rendered in favor of appellant.

Reversed and rendered.

J. B. NICHOLSON v. VAN V. NICHOLSON ET AL.

Decided February 24, 1910.

1.—Guardianship—Bill of Review.

A bill of review may be brought in the probate court under art. 2799, Rev. Stats., to revise an order discharging a guardian resigning and turning over the property of minor wards to his successor, and to obtain a restating of his guardianship accounts, at any time before the barring of such action of the wards by limitation after their attaining their majority.

2.—Same—Cases Distinguished.

DeCordova v. Rogers, 97 Texas, 60, followed. Ingram v. Maynard, 6 Texas, 131; Francis v. Northcote, 6 Texas, 186; Timmins v. Bonner, 58 Texas, 554; Heath v. Layne, 62 Texas, 694; Handy v. Woodhouse, 25 S. W., 40; Nicholson v. Harvey, 25 S. W., 458, distinguished.

3.—Same—Pleading.

Pleading held sufficient in a bill of review attacking the accounts of a guardian for errors of law apparent on his accounts and allegations charging him with fraudulent conduct.

4.—Same—Uninventoried Property.

The power to correct the order of the probate court by bill of review does not embrace authority to tax the guardian for property of the wards not inventoried or accounted for by him. Francis v. Northcote, 6 Texas, 186.

5.—Guardian—Support of Wards.

The guardian is not entitled to credit for expenditures for the maintenance and support of the wards in excess of the income derived from their estate in the absence of an order of the court authorizing the use of the corpus of the estate for that purpose.

6.—Guardian—Accounts—Commissions.

Where credits claimed by the guardian for moneys expended are disallowed as not having been paid, the commissions on such payments are also to be deducted from his credits.

7.—Bill of Review—Devastavit.

A charge against the guardian of the difference between the inventoried value of personal property and the amount realized on its sale, on the ground that the sale was without order of the court, is in the nature of a liability as for devastavit, and not permissible on bill of review. But debits and credits ascertained from review of the orders made by the court are proper. Francis v. Northcote, 6 Texas, 186.

8.—Guardianship—Review—Judgment.

The only judgment which the probate court could make on a bill of review of the order discharging a guardian of minors and settling his accounts was a restatement of the account and amount found due. It was proper to include in this the accounts of all the wards, though one was not a party to the bill, and was barred by limitation of his action for his part.

Appeal from the District Court of Lamar County. Tried below before Hon. Ben H. Denton.

Allen & Dahoney, for appellant.—Art. 2799, Sayles' Civil Statutes, providing for bill of review, should be construed so as to apply to orders pending the guardianship and before discharge. Constitution, art. 5, secs. 8 and 16; Sayles' Civ. Stats., art. 1337; Timmins v. Bonner, 58 Texas, 554; Ingram v. Maynard, 6 Texas, 131; Francis v. Northcote, 6 Texas, 185; Attridge v. Maxey, 15 Texas Civ. App., 134; Fort v. Fitts, 66 Texas, 593; Handy v. Woodhouse, 25 S. W., 40; Heath v. Layne, 62 Texas, 694; Ruenbuhl v. Hefron, 38 S. W., 1028; Hicks v. Oliver, 78 Texas, 235; Nicholson v. Harvey, 25 S. W., 458; Hirshfield v. Brown, 30 S. W., 962; DeBerry v. Wooters, 57 S. W., 885; Davis v. Harwood, 70 Texas, 71.

W. F. Moore and *Burdett & Connor,* for appellee.—The bill of review against appellant is expressly given by statute and such statute is not in contravention of the sections of the Constitution relied on by appellant. Rev. Stats., arts. 2799 and 2800; Heath v. Layne, 62 Texas, 686; Jones v. Parker, 67 Texas, 77; Young v. Gray, 60 Texas, 541; Miller v. Miller, 21 Texas Civ. App., 383; De Cordova v. Rogers, 97 Texas, 60; Kelsey v. Trisler, 32 Texas Civ. App., 177; Miers v. Betterton, 18 Texas Civ. App., 430; Bloom v. Oliver, 56 Texas Civ. App., 391.

LEVY, ASSOCIATE JUSTICE.—Appellee Van V. Nicholson for himself and as next friend for Albert, his brother, brought this suit in the Probate Court of Lamar County in the nature of a bill of review under art. 2799, Rev. Stats., to revise and correct the action of the

court upon final settlement of appellant, the guardian of their persons and estate. The suit was filed August 5, 1908. Van V. Nicholson became twenty-one years old on August 17, 1906, and Albert was under twenty-one years at the time of the suit and trial. The bill alleged as matters for review and restatement, that the guardian failed to return and inventory all of the personalty that he took possession of, naming it, and failed to account for it, and that he sold certain personal property without an order of court authorizing it, and that his account was erroneous and illegal as containing items stated as paid which were not paid, failing to account for certain items of cash shown by the inventory, and containing charges for maintenance and board which were wrong and unauthorized, and excessive and illegal commissions to himself, and in failing to account for certain rents and revenues. The prayer was to have the decrees and orders theretofore approved by the court set aside, and the guardian's account corrected and restated. Appellant answered by demurrer and special exceptions, and generally. The County Court overruled the demurrer and exceptions, set aside the order discharging appellant and approving his final account, restated the various accounts and charged him with $714.40. On appeal the District Court made like orders, charging appellant with $1752.49.

Appellant was appointed guardian of the person and estate of Van V., Emma, and Albert Nicholson, by the County Court of Lamar County on September 7, 1893, and he qualified as such. The estate consisted of land in Lamar and Collin Counties, personal property, some money, and notes and accounts. The land in Lamar County was sold under proper order of the court, and collection made of the notes and accounts as far as possible. The guardian made annual reports during a part of the time the proceeding was pending; and in April, 1900, filed his final report and resignation. His final report showed he had invested some money in land in Collin County under order of the court, and that the estate then consisted of land and certain household and kitchen furniture, and that his wards were living with their uncle in Navarro County. This uncle applied for letters and was appointed guardian by the County Court of Navarro County. On December 21, 1900, the resignation of appellant was accepted, and by an order of that date his final account was approved and he was discharged and directed to turn over the estates to the uncle as guardian in Navarro County.

After Stating the Case.—The appellant, by proper assignments of error, challenges the power and jurisdiction of the Probate Court to entertain a bill of review in guardianship proceedings after final discharge of the guardian, and the sufficiency of the grounds alleged for review in the bill. If article 2799, Rev. Stats., should be construed, as contended for by appellant, as applying to orders pending the guardianship and before entry of judgment of final discharge of the guardian by the court, then such ruling would be decisive of the appeal, and consideration of the other questions would be unnecessary. The precise facts of the case are that the guardian resigned as guardian, and rendered an account of the condition of the estate and of his guardianship to the court, which was by the court accepted

and approved by an order. The discharge of appellant was not on account of the wards becoming of legal age. The appellees were minors at the time. The statute provides that where a guardian wishes to resign he shall present his application in writing to that effect to the court and accompany such application with a full and complete account of the condition of the estate and of his guardianship. Article 2692, Rev. Stats. Upon the hearing of such application and account, if it appear that such guardian has accounted for all the estate according to law, the court shall enter an order upon the minutes that he deliver the estate remaining in his possession, if any there be, to some person who shall have been or may be appointed and qualified as guardian in his place, and upon compliance with such order such guardian shall be permitted to resign his trust and be discharged. Article 2695, Rev. Stats. It is provided by art. 2799, Rev. Stats., that any person interested may, by a bill of review filed in the court in which the proceedings were had, have any decision, order or judgment rendered by such court or the judge thereof, revised and corrected on showing error therein. The instant proceeding is by a party in interest, and was in the court in which the guardianship proceedings were had, and no question in that respect can be or is urged. The appellees are protected in the case against limitation by their minority, and hence the lapse of several years after the order discharging the guardian before filing the bill of review is not a bar. An order of approval by the court of an account and discharge of the guardian is clearly within the provision of the statute an "order or judgment rendered by such court." The question is narrowed to the power of the court to entertain the bill after entry of final order of discharge of the guardian. The appellant contends that the court has no such power, and that to so construe the article would render it unconstitutional. Several authorities are cited and relied on in support of his contention as hereafter discussed. The Probate Court having the power conferred on it by the Constitution to appoint guardians of minors, settle their accounts and transact all business appertaining to minors, and that jurisdiction being invoked by appointment of a guardian of a minor, and having the power by statute on proper application of a party interested to correct by bill of review orders or judgments rendered by it in such proceedings, and a final settlement of a guardian being an order or judgment authorized to be rendered by such court, it follows, we think, that a proper bill of review could be entertained by such court, as within its power, to revise a final settlement of a guardian after discharge of the guardian. The jurisdictional elements are the fact of a guardianship proceeding having been in that court, and the order or judgment sought to be reviewed having been entered by the court, and the filing of the bill by the proper person, and the notice to the guardian. The statute does not prescribe the time in which the court shall or shall not exercise the power. It has been ruled, however, that general limitation statutes would apply to the right of applicants to file the bill. DeCordova v. Rogers, 97 Texas, 60, 75 S. W., 16. This ruling is persuasive that the court has the power to review the final settlement at any time after the entry of the

order before the bar of limitation is complete. As long as the right to exercise the power of review exists the right of the court to entertain a proper bill by the proper party exists. To so construe the article as to say that unless the guardian was at the time of the filing of the bill acting as guardian the court would not have the power to entertain a proper bill of review of its orders or judgment, would be to make the power of the court dependent upon that fact and restrictive as to the time of the exercise of the power. The language of the statute does not warrant such construction. If the statute confers the power on the court to entertain a bill of review of its orders, as it does, and has placed no legal restriction or restraint upon the right of the court to exercise the power to review, then it necessarily follows that it is immaterial, as affecting the power of the court, whether the guardian be then discharged or not. This assumes the proper bill of review being filed. In the instant case the bar of limitation is not available, as the appellees, being minors at the time, are exempted during the period of their disability. In the case of DeCordova v. Rogers, supra, the Supreme Court uses the expression, "The bill of review must be brought in the same court that renders the orders complained of; and we think a bill of review could be brought to revise the action of the court upon final settlement." If it be conceded, as it must be, that the court has the power to revise by bill of review its orders during the pendency of the guardianship, then it must be conceded, we think, that the power would exist until the bar of limitation operated to restrict the exercise of the power, the statute not restricting the exercise of such power. The cases relied on by appellant are not opposed, we think, to our ruling. The cases are authority for another question than the one here, and are clearly distinguishable. Ingram v. Maynard, 6 Texas, 131, was not a case where a former order or judgment was sought to be reviewed by the Probate Court. The administrator, after his resignation and discharge voluntarily came into court and applied for a settlement. The court ruled that after closing the estate its jurisdiction was gone over the estate for any purpose of original jurisdiction. Francis v. Northcote, 6 Texas, 186, was not to review an order or decree, but a suit to compel an accounting and for judgment for the amount found due. It was a suit as for a devastavit and beyond the jurisdiction of the Probate Court as so ruled. Timmins v. Bonner, 58 Texas, 554, was a suit on the bond, and it was held that the Probate Court had no jurisdiction. Heath v. Layne, 62 Texas, 694, was a suit brought originally in the District Court to revise an order of the Probate Court. It was ruled that the District Court had no such original jurisdiction. Handy v. Woodhouse, 25 S. W., 40, was a suit on the bond of the deceased guardian, and it was ruled, as before, that this kind of a suit was not within the jurisdiction of the Probate Court. In Nicholson v. Harvey, 25 S. W., 458, the court ruled that the Probate Court had no jurisdiction as the case was plead, following Timmins v. Bonner. By following the case mentioned, and the pleadings being limitedly set out in the opinion, the court evidently meant to confine the ruling to the particular pleadings before them, and not to determine

than $200 showed a case beyond the jurisdiction though the petition closed with a general allegation of damages in the sum of $200.

4.—Same—Justice Court—Docket Entries.

A docket entry in Justice Court can only be made from the claim or petition of plaintiff. Where he filed a written petition showing damages exceeding $200, the case was beyond the jurisdiction, though entered on the docket as a claim for $200.

5.—Jurisdiction—Presumption.

Presumptions in support of the jurisdiction can not be made in the face of a record which shows the facts to be otherwise.

Appeal from the County Court of Titus County. Tried below before Hon. W. E. Riddle.

J. M. Burford and *Glass, Estes, King & Burford,* for appellant.—Since it affirmatively appears that the amount in controversy in this suit is more than $200, neither the Justice Court nor the County Court on appeal had jurisdiction to try his case. It is therefore the duty of this court to reverse and dismiss the same. Pecos & N. T. Ry. Co. v. Canyon Coal Co., 102 Texas, 478.

S. P. Pounders and *Chas. S. Todd,* for appellee, cited: Tarbox v. Brown, 3 Texas, 8; Graham v. Roder, 5 Texas, 145; Dwyer v. Bassett, 63 Texas, 276; Houston Ice & B. Co. v. North Galveston Imp. Co., 29 Texas Civ. App., 40; Hackney v. Schow, 21 Texas Civ. App., 613.

HODGES, ASSOCIATE JUSTICE.—This suit originated in a Justice Court of Titus County, and was against the appellant Texas & Pacific Railway Company and the St. Louis Southwestern Railway Company of Texas jointly to recover damages to a shipment of burros. Appellee recovered a judgment in that court for $86. On appeal to the County Court judgment was again rendered for him against the Texas & Pacific Railway Company alone for $150.

The first group of assignments raises the question of jurisdiction of the court below. Attention is called to the fact that the record shows on its face that the amount in controversy was over $200. It appears from the transcript that the suit was commenced by the plaintiff in the Justice Court by the filing of a written petition alleging in substance the delivery of forty of the burros to the Texas & Pacific Railway Company at Barstow, Texas, in Ward County, to be shipped over its railway to Big Sandy and there delivered to the St. Louis Southwestern Railway Company to be by it transported to the town of Mount Pleasant. It is averred that by rough handling eleven of the burros were killed and fifteen others were bruised and injured. The value of those killed is placed at $12.50 each, aggregating $137.50, and the damages to those injured at $6 each, aggregating $90; making a total of damages sued for of $227.50. The defendants filed a written answer containing a general demurrer and general denial. In what purports to be a "transcript of judgment" from the Justice Court are the following entries: "Suit upon account

for $200, filed the 24th day of August, 1908. Citation issued 24th day of August, 1908. Returnable to August term, 1908." Then follows the judgment, which appears to have been rendered on the 26th day of February, 1909. The original petition to which we have referred bears a file mark of August 24, 1908, the same date when the entries in the docket of the Justice Court appear to have been made. At a former day of this term, after the appellant's brief was filed in this court calling attention to the amount in controversy as shown by the petition, the appellee made an application for a writ of certiorari, in which it was alleged that the plaintiff's original petition at the time it was filed in the Justice Court claimed damages only in the sum of $200; that after the appeal was perfected to the County Court the appellee amended his petition so as to show that each of the eleven burros killed was worth $12.50, aggregating $137.50, instead of $10 each; that he did not rewrite the petition and file an amended original instrument, but, by consent of counsel for appellant, made the change in the figures of the original without thereafter refiling it. He prayed for a writ of certiorari to the clerk of the County Court of Titus County, commanding him to send up the original instrument for inspection. This application was accompanied by affidavits supporting the facts stated. The writ was refused because we were of the opinion that if we had the original instrument before us we would still be unable without a resort to evidence *aliunde* the record to determine when the erasures or interlineations were made; and for the further reason that the facts stated did not disclose an incomplete record. Article 998 of the Revised Civil Statutes, which empowers Courts of Civil Appeals by affidavit or otherwise to ascertain such matters of fact as may be necessary to the proper exercise of their jurisdiction, does not authorize us to resort to such evidence in determining the jurisdiction of the court below. The City of Austin v. Nalle, 85 Texas, 550, 22 S. W., 960; Chrisman v. Graham, 51 Texas, 454; Poole v. Mueller, 30 S. W., 951. The question presented in this appeal is, did the court from which it is prosecuted have jurisdiction? In the first case above cited the court said: "But we do not understand that this provision of the Constitution applies to questions which were put in issue, or which could have been put in issue, in the trial court, but only to such as may arise after a final disposition of the case in the court from which the appeal is taken. It has been practically so decided. Chrisman v. Graham, 51 Texas, 454, and causes cited. Every court must, in the first instance, determine its own jurisdiction; and when a question affecting its jurisdiction has arisen in a Court of Appeals, after the final decision of the matters in controversy in the court *a quo,* the Appellate Court must, of necessity, hear evidence *dehors* the record in order to determine it. The question whether or not the trial court had jurisdiction must be determined by the record." In determining the jurisdiction of the trial court, it is clear that we must confine our inquiry to the facts shown by the record alone. In Maass v. Solingsky, 67 Texas, 290, 3 S. W., 289, after alluding to the requirements of the statute with reference to the transmission of the original papers in the record from the Justice to the County or

District Court upon appeal, the court says: "It is from the transcript and papers thus sent up that the County or District Court ascertains what the cause of action presented and tried in the Justice Court was, and of this it must be informed; for on appeal it can pass on no case other than the one tried in the Justice Court. The cause of action asserted in the Justice Court is the only one that can be asserted in the District Court on appeal. When an appeal is taken from any judgment of a District Court to this court, it must be informed as to what the cause of action was, either through the pleadings made a part of the transcript, or by an agreed case made as the statute permits. In a case originating in a Justice Court this must be shown to this court by the entries made on the justice's docket, by the pleadings filed in the case, if any, or by an agreed case; and if it does not appear what the cause of action was through a transcript which shows it in some of these methods, this court can not revise the action of the District Court; unless it knows what was tried it can not know whether there was error or not." The record in this case showing that this suit was commenced by the filing of a written original petition by the plaintiff in which the aggregate amount sought to be recovered was in excess of the jurisdiction of the Justice Court, the County Court could not and did not acquire any jurisdiction to try the case on appeal, and hence this court is also without jurisdiction. Pecos & N. T. Ry. Co. v. Canyon Coal Co., 102 Texas, 478, 119 S. W., 294. It is true that in his petition the plaintiff states his aggregate damages at $200; but under the authority of the case above cited the correct sum of the items set out in the body of the instrument will control.

Counsel for the appellee insists that we should ignore the allegations of damages contained in the petition, and should look alone to the amount shown by the transcript of the docket of the justice of the peace. While the statute requires the justice to enter upon his docket both the nature and the amount of the plaintiff's claim, it is contemplated that he shall get this data from the pleadings, or other evidences, deposited or filed with him by the plaintiff. His entries therefore become mere copies where those evidences are in writing. The original pleadings are as much a part of the record to be sent up to the County Court on appeal as are the entries on the docket of the Justice Court. Rev. Civ. Stats., art. 1673. From the pleadings it appears conclusively that the case "tried" in both the Justice and County Courts was a suit for damages in excess of $200. The writer is of the opinion that whatever may have been the amount in controversy when the original suit was commenced in the Justice Court, an alteration in the plaintiff's original petition at any time thereafter before trial showing damages in excess of $200 would defeat the jurisdiction of the trial court. The alteration made in the manner claimed by the appellee was not an error of the court, but the deliberate act of the plaintiff in the suit with the consent of the defendant. The court was thereafter called upon to try a case over which it had no jurisdiction. In doing this it exceeded its authority. The contention of counsel for appellee that we should indulge every presumption in favor of the jurisdiction of the trial court invokes a rule

which has no application here. Such presumptions are indulged only in the absence of opposing facts. Where the record shows affirmatively, as in this case, the amount actually in controversy, there is no occasion for the indulgence of presumptions upon that issue. Chrisman v. Graham, supra.

The judgment of the County Court is reversed and the cause dismissed.

Reversed and dismissed.

BIGHAM BROTHERS v. PORT ARTHUR CANAL & DOCK COMPANY.

Decided February 26, 1910.

1.—Damage to Rice Crop—Proximate Cause—Charge Approved.

In a suit for damage to a crop of rice caused by rendering the water used for irrigating unfit for that purpose, charge of the court upon proximate cause, considered and approved.

2.—Same—Permanent Injury—Limitation.

Where the evidence showed that injury to the tillable lands of riparian owners upon a stream would be the natural and permanent result of the construction of a canal, and that such result must have been anticipated as reasonably certain, the owners' cause of action for damage to their lands and crops arose upon the completion of the canal, and limitation would run from that time; and the mere fact that during seasons of unusual natural conditions no injury would result, would not alter the case.

3.—Same.

When the injury to land is the natural and necessary result of the construction of a canal, then the injury is permanent and continuous as distinguished from a recurrent injury of a transient character dependent upon accidents and contingencies, and the statute of limitation would run from the completion of the canal and not from the date of any special damage caused by the construction.

4.—Corporation—Foreclosure Sale—Purchaser—Floating Debts.

Where a mortgage of the assets of a corporation is foreclosed, and the purchasers, for the purpose of managing the property and taking to themselves the necessary corporate franchises, organize a new corporation, this, not being a continuation of the old organization, is not liable for its debts or bound to perform its obligations unless such liability has been assumed by contract or has been imposed by an operative statute.

5.—Navigable Waters—Federal Jurisdiction—Canals.

An artificial navigable canal connecting navigable streams with tide water, is a highway of commerce, and, therefore, under the jurisdiction of the Federal government. A corporate owner of such canal would not have the right to obstruct or otherwise destroy the same to prevent the pollution of the navigable stream.

Error from the District Court of Jefferson County. Tried below before Hon. L. B. Hightower, Jr.

Smith, Crawford & Sonfield and *D. W. Glasscock,* for plaintiffs in error.—Defendant is liable if the maintenance and operation of its canal contributed to produce the salty condition of the waters of the bayou, although other cooperating causes, such as stage of the water, winds, tides, and other natural conditions, combined with the instru-

mentality of the canal to produce such results. Ft. Worth & D. C. Ry. Co. v. Scott, 2 Texas Civ. App., 137; San Antonio & A. P. R. Co. v. Gwynn, 4 Texas Civ. App., 344; Wood on Nuisances, section 820.

The court erred in virtually instructing the jury, as it did by its definition of "proximate cause," that in order for plaintiffs to recover, the injury to them must have been caused by the operation and maintenance of the defendant's canal directly, independently and alone, acting "in a natural and continual sequence, unbroken by any new, independent cause," that is, not cooperating and combining with other causes, natural conditions and contingencies.

The special charge should have been given, because the main charge of the court does not sufficiently and clearly distinguish between the permanence of the canal as a structure and the permanence or contrary of the injuries arising therefrom; and the jury might and did believe that if the structure of the canal was permanent—a patent fact—then that the injuries arising therefrom to the plaintiffs were necessarily also permanent, in which case they were told plaintiffs could not recover. Clark v. Dyer, 81 Texas, 342; Austin & N. W. Ry. Co. v. Anderson, 79 Texas, 427; Chicago, R. I. & P. Ry. Co. v. Hiltibrand, 44 Texas Civ. App., 614; International & G. N. R. Co. v. Davis, 29 S. W., 484; Bonner v. Wirth, 5 Texas Civ. App., 560; Gulf, W. T. & P. Ry. Co. v. Goldman, 8 Texas Civ. App., 257; City of Houston v. Houston, E. & W. T. Ry. Co., 26 Texas Civ. App., 228; Houston v. Parr, 47 S. W., 393; Dallas v. Young, 28 S. W., 1037.

The pleadings and the undisputed testimony showing that plaintiff's cause of action is based upon consequential, as distinguished from direct damages, same accrued only upon the actual occurrence of the damage, and was not barred by limitation, and the court erred in submitting such issue to the jury. Chicago, R. I. & P. Ry. Co. v. Hiltibrand, 44 Texas Civ. App., 614; 19 Enc. of Law, 200.

S. W. Moore and *Glass, Estes, King & Burford,* for defendant in error.

PLEASANTS, CHIEF JUSTICE.—We copy from appellant's brief the following concise statement of the nature and result of this suit:

"Bigham Brothers, a partnership composed of S. E. Bigham and W. F. Bigham, plaintiffs in error, filed their original petition in the District Court of Jefferson County complaining of the Port Arthur Canal & Dock Company, as defendant, on September 2, 1903, and their first amended original petition on April 4, 1904, to which, on first trial, demurrers were sustained, and they appealed to this court, whose opinion is reported in 91 S. W., 848; and later writ of error was granted by our Supreme Court, whose opinion is reported in 100 Texas, 192, remanding to District Court of Jefferson County for new trial.

"October 25, 1907, plaintiffs in error filed their second amended original petition on which this trial was had, being a substantial repetition of their previous petitions, alleging in substance their ownership of certain tracts, about 630 acres, of land in Jefferson

County, with a frontage of about four miles on Taylor's Bayou, a natural watercourse, in which they allege riparian rights and their previous use of the waters for irrigating rice on said land, same being fully equipped with machinery and canals for the purpose; further setting out the necessity and value of such use, and the peculiar fitness of the fresh waters of the stream therefor; further alleging in detail the natural conditions and topography assuring an ample supply of fresh water in the stream. That defendant owns, operates and maintains a large artificial canal cut from the deep and salty water of Sabine Pass to an intersection with Taylor's Bayou, whereby the salty waters of the gulf are intermittently and recurrently projected into Taylor's Bayou, so as at times, by cooperating with natural conditions, to pollute same and render the waters thereof salty and unfit for rice irrigation. That during the year 1902 plaintiffs in due time properly prepared and planted 450 acres of said land in rice, when by reason of the action of defendant's canal the waters were rendered salty and such crop was lost, whereas it would otherwise have produced about fifteen sacks per acre of the value of $3 per sack, at a reasonable cost to them of $7 per acre; wherefore, they allege their damages for the loss of said crop in the sum of twenty thousand dollars ($20,000), for which they sue.

"Defendant in error filed its second amended original answer October 28, 1907, on which it went to trial, pleading, after general demurrer and general denial, specially that the canal was constructed in 1898 by the Port Arthur Channel & Dock Company in aid of navigation, and virtually by the authority and under the supervision and control of the United States Government, with rights paramount to those of plaintiffs as riparian proprietors; further, that defendant, on January 7, 1902, purchased the canal at foreclosure sale, free from all liabilities, and maintained and operated same in aid of commerce and navigation, with rights superior to those of plaintiffs; and also set up the statutes of limitation of two years in bar; further, that the canal is now owned by the United States; further, that when defendant purchased same, the canal was a public highway and navigable water of the United States, which it could not obstruct, fill up or discontinue, and that its maintenance and operation thereof was solely subject to the jurisdiction and control of the United States.

"To this answer plaintiffs interposed numerous exceptions, as set out in their second amended supplemental petition filed October 29, 1907, all of which the court overruled. The cause was tried by jury October 28, 1907, and resulted in verdict for defendant."

Appellants are the owners of a rice farm on Taylor's Bayou, and as such owners have riparian rights in said stream, as alleged in their petition. In 1902 they planted a rice crop on said farm and, by reason of the salty condition of the waters of said bayou during the season for irrigating, said crop was lost and plaintiffs sustained damage thereby. The evidence is sufficient to sustain the finding that the construction and maintenance of the canal owned and operated by defendant was the proximate cause of the salty condition of the waters of Taylor's Bayou.

The first assignment of error presented in appellants' brief complains of the following paragraphs of the charge given by the trial court:

"The court erred in giving that portion of its charge to the jury as follows: 'And if you further believe from a preponderance of the evidence that the presence and existence of the defendant's canal, described in the pleadings before you, was a proximate cause of said bayou being salty or so impregnated with salt water as to render the same unfit for irrigating rice at the point thereon where plaintiffs' said land is situated, as the term proximate cause is hereinafter defined, then you will let your verdict be in favor of the plaintiffs, unless you shall find in favor of the defendant under the instructions given in paragraph three (3) of this charge following; by the expression proximate cause is meant that cause which in a natural and continuous manner, unbroken by any new, independent cause, produces an event or condition which would not otherwise have been produced.'" . . .

"'You are further instructed that although you may believe from the evidence that a portion of plaintiffs' said rice crop was lost and destroyed on account of their inability to use the waters of Taylor's Bayou for irrigating purposes at the time complained of by them in consequence of its salty condition, yet, unless you further believe from a preponderance of the evidence that the presence and existence of defendant's said canal was the proximate cause of the condition of such water at such time and place, your verdict must be for the defendant.'"

There was evidence from which the jury might have found that the waters of the bayou would have been rendered salty during the rice season of 1902 by natural causes if defendant's canal had not been in existence, and upon this state of the evidence it was proper for the court to instruct the jury that unless they believed that the existence of the canal was a proximate cause of the damage defendant would not be liable therefor. The definition of proximate cause given in the charge is abstractly correct, and if appellants desired further and fuller instructions embodying the law of cooperating or combined causes they should have requested such instructions. The charge is correct as far as it goes, and we can not say that because of its want of fullness the jury were misled in the application of the law to the facts in evidence. The assignment is overruled.

Upon the issue of limitation pleaded by the defendant the court instructed the jury as follows:

"If you believe from the evidence before you that when the canal was dug and completed, which the pleadings and all the evidence show you connects the deep water of Sabine Pass with said Taylor's Bayou, the condition and character of the waters of said Taylor's Bayou at the point thereon where the land of plaintiffs is situated, was thereby changed from fresh water, or water suitable and fit for the culture of rice, to salt water or water so impregnated with salt as to render the same unfit for rice culture during the irrigating season for rice; and if you further believe from the evidence that such change in the character and condition of the water of said bayou

is of a permanent nature, that is to say, if the evidence makes it reasonably certain to your minds that after the construction of said canal and its connection of the waters of Sabine Pass with the waters of Taylor's Bayou and in consequence of such connection, the waters of Taylor's Bayou, at the point where the plaintiffs' farm is situated, were rendered permanently unfit for the irrigation of rice during the proper irrigation season, taking into consideration all the facts and circumstances which are in evidence before you, then I instruct you that the plaintiff can not recover anything in this case, for the reason that his cause of action, if any he had, was barred by our statutes of limitation long before this suit was filed; and if you so find the facts as submitted for your consideration by this paragraph, your verdict must be for the defendant. On the other hand, if such change in the character of the water of said bayou at the point thereon where plaintiffs' said land is situated (if there is such change produced proximately by the opening of said canal), was or is not of a permanent nature, that is to say, if the jury believe from the evidence that it does not naturally and reasonably follow from the construction and existence of said canal as dug and constructed, that the waters of Taylor's Bayou have been permanently rendered unfit for the irrigation of rice at the point where the plaintiffs' land is situated during the proper irrigating season for rice on account of the salty condition of said water, considering all the facts and circumstances in evidence before you, but that such condition and character of water in regard to being salty was and is only a recurrent condition, and that such condition of water in said bayou at said point during the proper irrigating season for rice could not and can not reasonably be expected to occur at times during the proper season for irrigating rice sufficiently frequent to render the waters of said bayou at said point unfit for the irrigation of rice during the average season in that vicinity, then I instruct you that the plaintiffs' cause of action, if any they ever had, is not barred by limitation."

Appellees' canal was completed in the early part of 1899. This suit was filed on September 2, 1903, and the damages sought to be recovered is the value of a rice crop alleged to have been destroyed in 1902 by the salt water injected into Taylor's Bayou through appellee's canal.

There is evidence which would have authorized the jury to find that the salty condition of Taylor's Bayou at regular periods of time, which include the season for irrigating rice, has existed ever since the completion of the canal, and that this condition of regular recurrent saltiness of the waters of said bayou is the natural and permanent result of the construction of said canal and the operation of the wind and tides in their usual and ordinary manner, and that such result must have been anticipated as reasonably certain from the construction of the canal. We think the charge of the court above set out correctly informed the jury as to the law upon the issue of limitation applicable to these facts.

It seems to us that these facts show a permanent injury to appellants' riparian right to the use of the waters of Taylor's Bayou for irrigating purposes, and the liability for such injury arose and appel-

lant's cause of action therefor accrued upon the completion of the canal.

The evidence further shows that notwithstanding the fact that the usual and ordinary natural result of the construction of the canal was to render the waters of the bayou salty during the irrigating season of every year, that in years in which there were excessive rains before and during such season this salty condition did not exist. We do not think this fact would change the permanent character of the injury to appellants' riparian rights caused by the construction of the canal. If appellants had brought a timely suit to recover damages for the injury to their riparian rights caused by the permanent pollution of the waters of the bayou as the result of the construction of the canal, it would have been no defense to such suit to have shown that whenever there was unusual and excessive rainfall the pollution of the bayou did not occur.

If the jury found the facts before stated as to the natural and necessary result of the construction of the canal to be true, then the injury to appellant by reason of the construction of the canal was permanent and continuous, and not a recurrent injury of a transient character dependent upon accidents and contingencies for each recurrence of which successive actions may be brought, and therefore the statute of limitation would run from the construction of the canal and not from the date of the special damage caused by such construction. Houston Waterworks Co. v. Kennedy, 70 Texas, 233; Lyles v. Texas & N. O. Ry. Co., 73 Texas, 95; Austin & N. W. Ry. Co. v. Anderson, 79 Texas, 427.

The charge given by the court on the issue of limitation being a correct application of the law to the facts in evidence, it follows that the court did not err in refusing the special charge on that issue requested by appellants.

What we have said disposes of all the questions presented by appellants' several assignments, and each of said assignments is overruled without further discussion.

If we are in error in any of our conclusions upon the question presented by appellants' brief, still the judgment of the court below must be affirmed because under the undisputed evidence appellee can not be held liable for any damage which may have been caused appellants by the construction and maintenance of said canal. The canal was constructed by the Port Arthur Channel & Dock Co., and, as before stated, was completed in 1899. When so completed it connected the navigable waters of the Gulf of Mexico with the navigable waters of Taylor's Bayou and became itself a part of the navigable waters of the United States. The Port Arthur Channel & Dock Company became insolvent and was placed in the hands of a receiver in 1900. Thereafter a mortgage lien upon the property of said corporation was foreclosed and at a sale under said foreclosure decree had in February, 1902, the canal and all of the property of said corporation was purchased by S. R. Knott and Max Pam, who assigned their said purchase to the appellee, the Port Arthur Canal & Dock Company. This sale was reported to and confirmed by the court in which the foreclosure was had, and a conveyance of the property to

the appellee was made by the sale commissioner under the order of the court. It is well settled that appellee by purchasing the property did not assume or become responsible for debts or liabilities of its predecessor in title.

Mr. Thompson, in his work on corporations, says:

"Where a mortgage of the assets of a corporation—generally a railway company—is foreclosed, and the purchasers, for the purpose of managing the property and taking to themselves the necessary corporate franchises, organize a new corporation, this, not being a continuation of the old organization, is not liable for its debts, or bound to perform its obligations, although the new company takes the same name as the old one, unless such a liability has been assumed by contract, or has been imposed by an operative statute. This conclusion is obvious on the slightest reflection. It would entirely defeat and destroy the value of a mortgage security upon corporate property, if the mortgagees, obliged to become the purchasers of the property at a foreclosure sale, could organize themselves into a corporation for the purpose of managing it only upon the condition of assuming the floating debts of the old company. The result would simply be to oblige the secured creditors to pay the debts due to the unsecured creditors. Or as Mr. Justice Cooper quaintly remarked, it 'would be a practical illustration of the query, "does prohibition prohibit?" in the form of "does security secure?"'" This principle has been recognized and followed in this State in the following cases: Eddy & Cross v. Hinnant, 82 Texas, 354; Gulf, C. & S. F. Ry. v. Newell, 73 Texas, 339; Settegast v. Houston, O. L. & M. P. Ry. Co., 38 Texas Civ. App., 623 (87 S. W., 196).

At the time appellee purchased the rights of the Port Arthur Channel & Dock Company in the canal it had become a navigable water of the United States, and was and has since remained under the control of the Federal government.

The right of the Federal government to exercise jurisdiction and control over artificial canals connecting the natural navigable waters of the United States, has been long established.

Taylor's Bayou is a navigable water in fact, as shown by the undisputed evidence, and therefore must be so regarded in law, and the canal connecting said bayou with the Gulf of Mexico and thus forming a part of a continuous highway for commerce is a public highway and a navigable water of the United States. Perrine v. Chesapeake & Del. Canal Co., 9 How., 172; Perry v. Haines, 191 U. S., 17.

No negligence on the part of the appellee in the manner of maintaining the canal was attempted to be shown and, from the very nature of the case, the injury to the appellants could only be avoided by obstructing the canal, and this appellee could not lawfully do.

We think it clear that appellee can not be held liable for any of the damage claimed by appellants, and the trial court should have instructed a verdict in its favor. It follows that regardless of whether the charges complained of by appellants are erroneous the judgment of the trial court should be affirmed, and it has been so ordered.

Affirmed.

ARTHUR GENTRY v. STEPHENVILLE OIL MILL.

Decided February 26, 1910.

1.—Master and Servant—Defective Machinery—Duty of Servant.

An employee is never required to exercise ordinary care to discover defects in machinery or implements furnished him by his employer, or to discover unknown dangers arising from their use in the manner directed by his superior. Hence a charge imposing this duty on an employee in a suit by him for damages for personal injuries received in "throwing" a belt in obedience to orders, with the danger of which he was not familiar, was reversible error.

2.—Same—Assumed Risk—Question of Fact.

When an employee acts suddenly on an imperative order enjoining instant obedience, and the danger is not certain, the issues of negligence and assumed risk are for the jury, even though the employee may be experienced.

Appeal from the District Court of Erath County. Tried below before Hon. W. J. Oxford.

F. H. Chandler and *J. B. Keith,* for appellant.—The servant assumes the risk of those dangers of which he knows, or of which the evidence discloses that he must necessarily have known by reason of the duties of his employment. The law does not require of him ordinary care, as in negligence, to ascertain and know of all the dangers connected with his employment. Texas & N. O. R. Co. v. Jackson, 51 Texas Civ. App., 646; Missouri, K. & T. Ry. Co. v. Hannig, 91 Texas, 347; Texas & N. O. R. Co. v. Davidson, 49 Texas Civ. App., 85; El Paso & S. W. Ry. Co. v. Vizard, 39 Texas Civ. App., 534.

Where a servant is peremptorily commanded by his superior to do a thing hurriedly, he does not assume the risk of doing that thing unless the danger is obvious. Same authorities.

Lassiter & Harrison and *Martin & George,* for appellee.—The paragraph of the charge complained of is not erroneous when considered as a whole, because it requires the jury to find either that the appellant was acquainted with the dangers of his undertaking, or that by the exercise of ordinary care he should have known of those dangers, before he can be said to have assumed the risk. Brownwood Oil Mill Co. v. Stubblefield, 53 Texas Civ. App., 165; Chicago, R. I. & G. Ry. Co. v. Denton, 101 S. W., 452; Missouri, K. & T. Ry. Co. of Texas v. Hanson, 90 S. W., 1122; Gilmartin v. Kilgore, 52 Texas Civ. App., 177; Haywood v. Galveston, H. & S. A. Ry. Co., 38 Texas Civ. App., 101; San Antonio & A. P. Ry. Co. v. Drake, 85 S. W., 447; Ft. Worth & R. G. Ry. Co. v. Robinson, 37 Texas Civ. App., 465; Smith v. Armour & Co., 37 Texas Civ. App., 633; International & G. N. Ry. Co. v. Royall, 37 Texas Civ. App., 261; Klutts v. Gibson, 37 Texas Civ. App., 216; Gulf, W. T. & P. Ry. Co. v. Smith, 37 Texas Civ. App., 188; San Antonio Sewer Pipe Co. v. Noll, 37 Texas Civ. App., 269; Ft. Worth Stock Yards Co. v. Whittenburg, 34 Texas Civ. App., 163; Horton v. Ft. Worth Pkg. & Prov. Co., 33

Texas Civ. App., 150; Ft. Worth Iron Works v. Stokes, 33 Texas Civ. App., 218; Houston. E. & W. T. Ry. Co. v. De Walt, 96 Texas, 121.

CONNER, CHIEF JUSTICE.—Appellant was an employe of the appellee corporation, engaged in and about appellee's cotton seed oil mill at Stephenville in oiling machinery, sewing broken belts, and such other work as he was called upon to do by the foreman of the corporation. On February 2, 1907, while in the discharge of his duties he was "imperatively ordered," as is alleged, by the foreman of the work to throw the "huller belt" moving rapidly at the time. In the effort to do so appellant was thrown upon the floor of the mill and injured. This suit was instituted to recover damages for the injury so received, and appellant alleged that he was without knowledge of the danger in attempting to throw said belt while the machinery was in motion; that he hurriedly obeyed the orders of his superior, the foreman, without time to consider the danger of attempting to execute the order and relying upon the superior knowledge of the said foreman and believing that he would not order him to do a dangerous thing. It was alleged that his undertaking was dangerous and known to be so to the foreman; that the foreman gave no warning of the danger, which it was his duty to do; and that the defendant and its foreman were negligent in giving the direction stated while the belt was in motion, and in failing to so warn him.

Appellee pleaded the general denial, assumed risk, and contributory negligence on appellant's part. The trial resulted in a verdict in appellee's favor, from which this appeal has been prosecuted.

Error is assigned to the following section of the court's charge: "If you believe from the evidence in this case that plaintiff was familiar with his duties while working for the defendant, and that he knew or by the exercise of ordinary care could have known of whatever danger there was in removing belts from the line shaft or pulleys, and was familiar with such dangers when he undertook to remove said belt from said shaft and pulley, or by the exercise of ordinary care should have known, and was injured, then he assumed the risk and can not recover in this case and your verdict should be for the defendant."

It is well settled that when the servant enters the employment of the master, he has the right to rely upon the assumption that the machinery, tools and appliances with which he is called upon to work are reasonably safe, and that the business is conducted in a reasonably safe manner. He is not required to use ordinary care to see whether this has been done or not. He does not assume the risk arising from the failure of the master to do his duty, unless he knows of the failure and the attendant risks or in the ordinary discharge of his own duty must necessarily have acquired the knowledge. See Missouri, K. & T. Ry. v. Hannig, 91 Texas 347; Texas & N. O. Ry. v. Davidson, 49 Texas Civ. App., 75 (107 S. W., 949); El Paso & S. W. Ry. v. Vizard, 39 Texas Civ. App., 534 (88 S. W., 461); Texas & N. O. Ry. v. Jackson, 51 Texas Civ. App., 646 (113 S. W.,

628). The charge, therefore, is erroneous in devolving upon appellant the duty of exercising ordinary care to discover the danger of removing the pulley belt while the machinery was in motion. He testified to the effect that he had never before removed the belt while the machinery was in motion, nor seen others do so; that he had never heard anyone say that it was dangerous; that when directed by the foreman to remove the belt he went up on what is known as the running-board, some seven or eight feet from the floor, expecting to stand there until the machinery was stopped; that as he got upon the running-board Mr. Donnell, appellee's foreman, handed him a broom and told him to throw the belt off while it was running; that "I told him I didn't think I could do it, and he then said to try it anyhow, and I then took the broom and tried to throw the belt and it knocked me off to the floor. . . . I did not know that it was not safe to throw it while it was in motion."

Appellee insists that the error is harmless because under the undisputed evidence appellant assumed the danger of which he complains, but we do not think so. We can not say as a matter of law that the danger was obvious, and nothing in the evidence requires the conclusion that appellant, by the exercise of ordinary care for his own safety in the discharge of his duties, must necessarily have known of the danger of removing the belt under the circumstances detailed by him. In Passmore's Instructions to Juries in Texas Civil Cases, section 57, it is said: "Where the employe acts suddenly on an imperative order enjoining instant obedience, and the danger is not certain, the consideration of negligence and assumed risks are for the jury, even though the employe may be experienced," citing Galveston, H. & S. A. Ry. v. Sanchez, 65 S. W., 893, which supports the text. We approve this announcement of the law as applicable here, and think it was the duty of the court to have submitted to the jury the issues of assumed risk and of contributory negligence under appropriate instructions.

The objection to the charge we have quoted also appears in the paragraph immediately following, to which error is likewise assigned, but we need to add but little, if anything, to what we have already stated on the subject. In all probability the able trial judge was misled by general expressions in some of the decisions to the effect that if the servant by the exercise of ordinary care should have known the danger, he assumes the risk. The ordinary care meant, however, and which alone is required of the servant, is that for his own safety in the discharge of his own duties, and, if in the exercise of this degree of care in the discharge of his duties he must necessarily have known of the danger of which he complains, he can not recover, because in such case the law imputes knowledge of the danger. But as before stated, he is never required to exercise ordinary care to discover defects in machinery or implements furnished him by the master, or to discover unknown dangers arising from their use in the manner directed by the master.

We conclude that the judgment must be reversed and the cause remanded.

Reversed and remanded.

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY v. J. W. PARKER.

Decided February 26, 1910.

Appeal—Defective Record—Practice.

Because of the increasing frequency of the requests to grant a rehearing and award a writ of certiorari to perfect the record on appeal, a determination is expressed to adhere more closely to the wholesome rule of refusing such motions when the defect is caused by the carelessness of the parties to the appeal.

Appeal from the District Court of Tarrant County. Tried below before Hon. Mike E. Smith.

Spoonts, Thompson & Barwise, for appellant.

McCart, Bowlin & McCart, for appellee.

No briefs reached the reporter.

SPEER, ASSOCIATE JUSTICE.—This is an appeal from the District Court of Tarrant County, but the transcript contains no judgment, and the appeal is therefore dismissed for want of jurisdiction in this court. Sayles' Texas Civil Statutes, article 1383; Riddle v. Bearden, 36 Texas Civ. App., 97 (80 S. W., 1061). Appeal dismissed.

ON MOTION FOR REHEARING AND CERTIORARI.

On February 26th we dismissed the appeal in this case because the record contained no final judgment, and we are now asked to grant a rehearing and award the writ of certiorari to perfect the record in this respect, and we are cited to the case of Hogsett v. Northern Texas Traction Company, 55 Texas Civ. App., 72 (118 S. W., 807), as authority for granting the motion. We have no doubt of our power to grant a rehearing and award the writ of certiorari to perfect the record after the final disposition of the case, nor can any doubt exist that this power has been exercised by the appellate courts. On the other hand, such course has not been uniform, and this court has heretofore, and since the decision in the Hogsett-Traction Company case, in Sanders v. Eastland Independent School District, 126 S. W., 941, refused just such relief. The frequency with which we are confronted with requests for such relief as this has made it necessary to adhere more strictly to the wholesome rule announced by our Supreme Court in Ross v. McGowen, 58 Texas, 603, quoted in the opinion in the Sanders-School District case. Such relief was also refused in the case of Clark v. Ware (not yet reported), where a judgment was reversed for want of jurisdiction in the trial court due to an omission in the transcript, which omission was sought to be supplied by certiorari on rehearing. The rule announced by the Supreme Court and adhered to in the cases last cited is calculated to compel the attention of both the appellant and appellee to the state of the record on which

we are asked to revise the trial court's ruling, and to save the needless consumption of this court's time in reconsidering cases on corrected records, made necessary by carelessness or inattention of one or both parties to the appeal. The motions are therefore overruled.

Dismissed.

E. P. BOMAR ET AL. v. LIZZIE B. MORRIS ET AL.

Decided February 26, 1910.

1.—Citation—Vouching in Warrantor—Judgment by Default.

Defendants in trespass to try title disclaimed as to the land sued for unless it should be shown that the tract of land claimed by plaintiff conflicted with a tract bought and claimed by them under deed with covenant of warranty, in which event they pleaded not guilty, among other defenses, and for recovery over against the independent executors of their vendor, on said covenant of warranty; the executors were served with citations requiring them to appear and answer plaintiff's petition, although they were not named therein as defendants, and said citations, besides the statutory requirements, recited the filing of the answer of said defendants and the allegations therein contained made the basis of the plea over against the executors, and commanded the officer to serve said executors with a true copy of the petition and said answer, but did not in terms require the executors to appear and answer said plea over against them. Held, a judgment by default against the executors on the covenant of warranty of their testator, was void, although the judgment recited that said executors had been duly cited.

2.—Judgment by Default—Recital of Service.

It is well settled that judgment by default reciting service upon the defendant, rendered by a court of competent jurisdiction, can not be successfully attacked in a collateral proceeding by showing that there was no service; but it is as well settled that a judgment by default will be reversed on appeal unless the record contains a citation showing due service or an appearance by the defendant, even though the judgment contains a recital that the defendant was duly served with citation.

3.—Special Judge—Agreement of Parties.

Where a cause was tried before a special judge by agreement of counsel for plaintiff and for such defendant as answered, but there was no evidence of such agreement by other defendants against whom judgment was rendered by default, the judgment was void as to the last named defendants.

Error from the District Court of Hale County. Tried below before Hon. R. C. Joiner, Special Judge.

Dalton & Nugent, for plaintiffs in error.—It is error to enter a judgment by default in an action based on amended petition, where defendant was not cited to answer and did not waive citation, accept service or enter his appearance, and neither appeared nor answered at any time or in any manner in the suit. And this is true where warrantor, made a party by defendants in a suit for land, describing it, which the warrantors lay no claim to by said description, and the plaintiffs filed an amendment during the time, setting up that the land originally sued for conflicted with the land warranted, and warrantors were not cited to answer the amended petition and did not waive or accept service. Pendleton v. Colville, 49 Texas, 525; Pena v. Pena, 43 S. W., 1028; Stuart v. Anderson, 70 Texas, 588.

The judgment against defendants, E. P. and D. T. Bomar, is erroneous, and should not have been rendered against said defendants by R. C. Joiner, special judge, because said defendants never agreed upon him as such special judge, and are not bound by his judgment, and had the right to have the case tried before the regular judge.

Robt. G. Johnson, for defendants in error.

DUNKLIN, ASSOCIATE JUSTICE.—By original petition filed July 5, 1906, F. W. Struve sued Brinkley Morris, Mrs. Lizzie B. Morris and others to recover a tract of land described as "section No. 18 in block JK 2, surveyed by virtue of certificate No. 4/638 issued to the G., C. & S. F. Ry. Company, containing 640 acres of land." The petition was in the usual form of a suit in trespass to try title.

Brinkley Morris and Mrs. Lizzie B. Morris filed an answer to the petition, in which they disclaimed any interest in the land, unless it should be shown that the survey so described conflicted with survey No. 53 in block A1 purchased by them from J. E. Bomar, now deceased, by deed of conveyance with covenants of general warranty of title, and in the event of such a conflict they pleaded not guilty, a general denial, limitation of three, five and ten years, and for recovery over against D. T. Bomar and E. P. Bomar, independent executors of the estate of J. E. Bomar, deceased, on said covenant of warranty of title. Owners of other surveys adjoining that claimed by plaintiffs were also made parties defendants. Said executors were served with citations requiring them to appear and answer plaintiffs' original petition, although in that petition they were not named as defendants. The citations, after reciting the names of the parties plaintiffs and defendants, and the nature of plaintiffs' demand, also recited the filing of the original answer of defendants Brinkley Morris and Mrs. Lizzie B. Morris, and the allegations therein contained made the basis of the plea over against D. T. and E. P. Bomar, executors, and commanded the officer executing the writ to serve D. T. and E. P. Bomar each with a true copy of plaintiff's original petition and the original answer of Brinkley Morris and Mrs. Lizzie B. Morris, but did not, in terms, require D. T. and E. P. Bomar to appear and answer said plea over against them. The record does not contain any other citation against the executors nor any pleading filed by them. After amended pleadings by the other parties, the only controverted issues left for determination between them were such as arose from conflicts between the survey claimed by plaintiffs and those claimed by defendants who filed answers.

Plaintiff's suit against defendants Brinkley Morris, Mrs. Lizzie B. Morris, Mrs. Cora Handley and Otto Stolly was severed from his suit against other defendants, and a trial resulted in a judgment for plaintiff against Brinkley Morris and Mrs. Lizzie B. Morris for a recovery of part of survey 53, block A1, claimed by them, and in their favor over against D. T. and E. P. Bomar, executors of the estate of J. E. Bomar, deceased, for three hundred and sixty-two dollars and fifty cents, on the warranty of title of the decedent, and from such

judgment against them the executors have prosecuted this writ of error.

It is unnecessary to notice the judgment as to other defendants, as the same is not material to the issues presented for our decision. The judgment recited that the Bomars had been duly cited, but that they failed to appear and answer. The plea over against the Bomars was a cause of action separate and distinct from that asserted by plaintiff against Mrs. Lizzie B. and Brinkley Morris, and in the absence of any appearance by the Bomars, service of citation upon them requiring them to answer that suit was as necessary as service of citation upon other defendants to answer plaintiff's demand. Harris v. Schlinke, 95 Texas, 91; Kregel v. Bolanz, 100 Texas, 577. It is well settled that a judgment by default reciting service upon the defendant, rendered by a court of competent jurisdiction, can not be successfully attacked in a collateral proceeding by showing that there was no service. Williams v. Haynes, 77 Texas, 283. But it is equally as well settled that on appeal from a judgment by default, prosecuted in the suit in which the same was rendered, the judgment will be reversed unless the record contains a citation showing due service thereof, or an appearance by the defendant, even though the judgment contains a recital that defendant was duly served with citation. Mayhew & Company v. Harrell, 57 Texas Civ. App., 509 (122 S. W., 957), and authorities there cited; Glasscock v. Barnard, 125 S. W., 615.

The record shows that the suit was tried before Hon. R. C. Joiner as special judge by agreement of counsel for all the parties to the suit except the Bomars, but fails to show that the Bomars were parties to the agreement, and, as they did not appear and participate in the proceedings, the special judge was without lawful authority to determine the issues affecting their rights. Sayles' Texas Civil Statutes, articles 1069 and 1077; Latimer v. Logwood, 27 S. W., 960.

For the errors above noted the judgment against D. T. and E. P. Bomar, executors under the will of J. E. Bomar, deceased, is reversed, and the suit against them remanded for another trial, but in all other respects the judgment is undisturbed.

Affirmed in part and reversed and remanded in part.

JOHN VAUGHN ET AL. v. FARMERS & MERCHANTS NATIONAL BANK, ALVORD, TEXAS.

Decided February 26, 1910.

1.—Venue—Dishonored Draft—Plea of Privilege.

L. drew two drafts for different amounts upon two parties and endorsed and deposited them in a bank for collection; the bank at once placed the amount of the drafts to L.'s credit; payment of the drafts was refused; L. and the drawees resided in different counties; the bank filed suit in the county of L.'s residence against L. as endorser and guarantor and against the other parties as drawees; upon a plea of privilege by the drawees to be sued in the county of their residence on the ground that the endorsement and guaranty of L. was a simulated liability for the purpose of giving venue in the county in which the suit was brought, evidence considered and held sufficient to sustain the action of the court in overruling the plea of privilege.

2.—Same.

A secret purpose on the part of the drawer of a draft to place the venue in his own county in the event the drawee refused to pay, would not affect the statutory right of venue in favor of one who cashed the draft, provided he acted in good faith; nor would such right be defeated by the mere fact that the party who cashed the draft charged it back on his books against the drawer, when this was done without the consent of the drawer when the drawee refused to pay.

3.—Contract—Sale of Land—Breach—Measure of Damages.

Where a vendor in a contract to convey land has no title at the time the contract is made, the purchaser, upon the breach of the contract, is not entitled to recover the difference between the contract price and the market value of the land, but can only recover the amount of the purchase money paid with interest from the date of payment, together with such special damage, if any, as may have been incurred by reason of having been induced to enter into the contract; if he has not paid the purchase money, then he is confined to his special damages alone, which must be alleged and proved.

4.—Banks and Banking—Draft—Endorsement in Blank.

It is held in this State that a check drawn upon a bank by a depositor amounts to an equitable assignment of so much of the fund in favor of the drawee as is necessary to pay it; and by the law merchant an endorsement of a check in bank for collection, when passed to the credit of the drawee and drawn against by him, amounts to a transfer of the legal title to the fund against which the check is drawn.

Appeal from the District Court of Wise County. Tried below before Hon. J. W. Patterson.

Randolph & Randolph, for appellants.

R. E. Carswell, for appellee.

CONNER, CHIEF JUSTICE.—This suit was instituted by appellee against John Vaughn and the First National Bank of Plainview, residents of Hale County, and against W. J. Leach, a resident of Wise County, to recover upon two certain drafts or bills of exchange drawn by said W. J. Leach, one, for the sum of five hundred dollars, upon John Vaughn and the First National Bank, and the other for the sum of nine hundred and sixty dollars, drawn upon John Vaughn alone. Appellee sued Leach as the guarantor of the checks, and the others as the respective drawees. The checks were accompanied by brief statements of the accounts upon which they were based, from which it appears that the sum of five hundred dollars had been deposited by Leach in the First National Bank of Plainview, upon a contract made by Vaughn, to convey a certain tract of land, which contract it was averred Vaughn had breached. The draft for nine hundred and sixty dollars upon Vaughn was predicated upon the same alleged breach of contract, and was asserted to be for the amount of the difference between the contract price and the value of the land at the date of the breach, and claimed as damages.

The defendants, Vaughn and the First National Bank, answered by a plea of privilege, to be sued in the county of their residence, specially averring that the alleged guaranty of Leach was simulated

and made for the sole purpose of acquiring jurisdiction over their persons in Wise County. These defendants also pleaded the general denial, and specially that the defendant Vaughn had signed the contract for the sale of land to Leach, not as principal, but as the agent of one H. Rabb, which was known to the defendant Leach, and that Leach had failed and refused to carry out the contract for the sale of the land, and that Vaughn was entitled to recover the five hundred dollars sued for, as forfeit.

The trial was before the court without a jury, and after hearing the evidence, the court overruled the plea of privilege and rendered judgment in favor of the plaintiff, against John Vaughn and the First National Bank, and W. J. Leach, as guarantor, for five hundred dollars, with interest; and against John Vaughn, and W. J. Leach as guarantor, for three hundred and twenty-four dollars; and against the defendant Leach, for the sum of one thousand four hundred and seventy-five dollars, the amount of the two checks, with interest, to which judgment the defendants Vaughn and the First National Bank excepted, and have duly prosecuted this appeal.

But two questions substantially have been presented for our consideration. It is insisted first that the evidence fails to support the court's judgment upon appellants' plea of privilege, but we feel unable to so say. The evidence in behalf of appellee is to the effect that Leach drew the drafts, deposited them for collection with the appellee bank, which at once placed the amount to Leach's credit on the bank books, and all parties deny that the transaction was simulated, or that at the time, anything was said by the bank officials or Leach, indicating that the purpose of the endorsement of the drafts by Leach was to acquire jurisdiction over appellants. "A bill of exchange is a written order or request by one person to another for the payment of a specified sum of money to a third person absolutely and at all events." See 1 Words & Phrases, page 784, and authorities cited by the author. The drafts, therefore, drawn by Leach, were bills of exchange within the meaning of the definition quoted, and Leach became liable thereon to the appellee bank by the express terms of our statute which provides that: "The drawer of any bill of exchange which shall not be accepted when presented for acceptance, shall be immediately liable for payment thereof; and the holder of such bill may secure and fix liability of any indorser thereof by instituting suit against such drawer, within the time and in the manner prescribed by this title." Revised Statutes, article 306. Moreover, it has been held in our State that a check drawn upon a bank by a depositor, amounts to an equitable assignment of so much of the fund in favor of the drawee as is necessary to pay it. See Doty v. Caldwell, 38 S. W., 1025. So too, by the law merchant, an endorsement of a check in blank for collection, when passed to the credit of the drawee, and drawn against by him, amounts to a transfer of the legal title to the fund against which the check is drawn. See 1 Daniels on Negotiable Instruments, sec. 340b; 5 Cyc. page 494, et seq. If then the appellee bank, upon the deposit and endorsement of Leach, of the checks mentioned, had cause of action against Leach upon the non-payment and protest of the drafts, as shown in the evidence,

appellee could sue Leach in Wise County, and join appellants in the suit (see Rev. Stats. art. 1194, paragraph 4, *et* Leahy v. Ortiz, 38 Texas Civ. App. 314 (85 S. W., 824); Provident National Bank v. Hartnett, 100 Texas, 214,) unless indeed the transaction was a simulated one, and the evidence is not conclusive against the court's finding of this issue. It is undisputed that upon the deposit of the checks, the appellee bank placed the aggregate amount thereof to Leach's credit, and that he thereafter drew against the fund, which was treated both by him and the bank as his own. There is nothing in the evidence that requires the conclusions on our part that the bank, at the time the checks were accepted and forwarded for collection, acted outside the scope of its ordinary undertakings, or with the ulterior purpose of fraudulently acquiring jurisdiction. So far as the evidence discloses, nothing was said at the time save that the cashier asked Leach if he knew that his endorsement made him liable thereon. Leach replied that he did, thus indicating in fact that the bank was accepting the checks and transferring the amount thereof to Leach's credit upon the faith that Leach was liable, Leach being, as the cashier testified, considered solvent and responsible therefor. If the bank, or its officers at the time, acted in good faith, its right of recovery against Leach can not be denied on the ground that Leach himself may have had an undisclosed purpose of conferring jurisdiction upon the District Court of Wise County, in event a contest arose over the matter.

Nor do we think such right of action was defeated by the mere fact, shown in this case, that upon the nonpayment of the checks upon presentation, they were charged back to Leach, upon the books of the appellee bank. Leach testified that this was done without his authority, and at most it was but a circumstance upon the issue of fraud to be considered, together with all other circumstances, by the court trying the cause. We conclude that, on the whole, we are unable to disturb the court's ruling on the plea of privilege.

Appellants' contention upon the second question presented, we think, must be sustained. The evidence shows that on the 25th day of August, 1908, John Vaughn, as party of the first part, contracted with W. J. Leach, as party of the second part, to "convey" or "cause to be conveyed" three hundred and twenty acres of land situated in Hale County, owned by the H. Rabb hereinbefore mentioned, who was a nonresident; that upon the completion of the contract, Leach deposited the sum of five hundred dollars in the appellant bank at Plainview, to constitute part payment for the land, in event the contract was complied with on Vaughn's part, or in event of a breach thereof on Leach's part, to be forfeited. The evidence further shows that Leach knew at the time of the execution of this contract, that Rabb was the owner of the land, and that later Rabb and Leach failed to agree upon whether Rabb's proffered conveyances were sufficient, each party claiming compliance with his part of the contract. It is also undisputed that the check for nine hundred and sixty dollars, drawn by Leach upon appellant Vaughn, was for the alleged value of the land in excess of its contract price. This, in no event, could constitute the proper measure of damages. Vaughn's individual li-

ability for the breach of the contract established by the judgment is not questioned by any proposition presented by appellants, and hence, conceding such liability, he is at most but a vendor without title, and the rule is well settled, that where a vendor in a contract to convey land did not have title at the time the contract was made, the purchaser upon the breach of the contract is not entitled to recover the difference between the contract price and the market value of the land, but can only recover the amount of the purchase money paid upon the contract with interest from the date of payment, together with such special damages, if any, as may have been incurred by reason of having been induced to enter into the contract. If he has not paid the purchase money, then he is confined to his special damages alone, which must be alleged and proved. See Clifton v. Charles, 53 Texas Civ. App., 448, (116 S. W., 120,) and authorities therein cited. The check held by the appellee bank was subject to all defenses that could be urged against the drawer Leach. No special damage within the meaning of the rule was alleged to have been done Leach, because of the breach of the contract, so that the appellee bank, as against the appellant Vaughn, was entitled to recover only the five hundred dollars purchase money paid by Leach, that was awarded below, with interest, and was not entitled to recover the three hundred and twenty-four dollars evidently awarded upon the nine hundred and sixty dollar draft.

We therefore conclude that the judgment should be affirmed in so far as appellee was awarded judgment for five hundred dollars with interest against appellants John Vaughn and the First National Bank of Plainview, and against Leach, as guarantor for both drafts, in the sum of one thousand four hundred and seventy-five dollars, but the judgment against appellant John Vaughn for the further sum of three hundred and twenty-four dollars, is reversed and here rendered in his favor, and the costs of appeal to be taxed against appellee.

Affirmed in part and reversed and rendered in part.

Mr. Justice Speer disqualified and not sitting.

Writ of error refused.

TEXAS & PACIFIC RAILWAY COMPANY v. WOOLDRIDGE & HAMBY.

Decided February 26, 1910.

1.—Railroads—Escape of Sparks—Charge.

In a suit against a railroad company for the value of grass burned by sparks from its locomotives, the court charged the jury as follows: "If from the evidence you believe that the defendant failed to equip its engines, from which the sparks escaped which caused the fire, with the most improved spark arresters in use; or that the employees of the defendant operating said engines were guilty of negligence in failing to use ordinary care to prevent the escape of sparks, then and in that event the prima facie case above mentioned is not rebutted." Held, error, in that (1) it imposed upon the defendant the absolute duty of equipping its engines with the most improved spark arresters, whereas the exercise of ordinary care in that respect was the measure of its duty; and (2) it assumed that sparks did escape from defendant's engines and set fire to plaintiff's grass, which was a controverted fact.

2.—Same—Evidence.

The issue being whether or not plaintiff's grass was burned by sparks from defendant's engine, and the defendant having proved that all of its engines were equipped with the same spark arrester which was described as being the latest and most improved to date, it was not error to permit the plaintiff to prove that other engines belonging to defendant had thrown sparks at other times along defendant's right of way.

Appeal from the County Court of Eastland County. Tried below before Hon. E. A. Hill.

Earl Conner, for appellants.

J. J. Butts, for appellees.

SPEER, ASSOCIATE JUSTICE.—This is a grass burning case, prosecuted by appellees against appellant, in the County Court of Eastland County, in which there was a recovery in the sum of one hundred dollars. In the course of his instructions to the jury, the trial court used the following language: "If, from the evidence, you believe that the defendant failed to equip its engines, from which the sparks escaped which caused the fire, with the most improved spark arresters in use, or that the employees of the defendant operating said engines were guilty of negligence in failing to use ordinary care to prevent the escape of sparks, then and in that event the *prima facie* case above mentioned is not rebutted." The court had previously instructed the jury that the escape of sparks of fire from appellant's engine, setting fire to appellees' grass, would constitute a *prima facie* case of negligence. The charge quoted is not the law. It erroneously imposed upon appellant the absolute duty of equipping its engines from which the fire escaped, with the most improved spark arresters in use, whereas, the measure of its duty in that respect was to exercise ordinary care to provide its engines with such device. Texas Cen. R. R. Co., v. Qualls, 58 Texas Civ. App., 120 (124 S. W., 140); St. Louis S. W. Ry. Co. v. Crabb, 80 S. W., 408, and authorities there cited. The error is a vital one, and calls for a reversal of the case.

The charge is also open to the criticism that it assumes that sparks did escape from appellant's engines and set fire to appellees' grass, and, while we have not taken the time, in view of the necessary reversal, to examine the facts to ascertain if this error could be held to be harmless, on another trial it is as well for the charge to omit this assumption and submit the question for the finding of the jury. The court's definition of negligence could hardly be held to be affirmatively erroneous, yet the charge could as easily and more safely follow the approved form.

There was no error in permitting testimony that other engines belonging to appellant had thrown fire along and near appellant's right of way, at other times, since such proof tended to rebut appellant's evidence to the effect that all of its engines were provided with the same spark arrester, which is described as being the latest and most

up-to-date in use in the country. Texas Cen. R. R. Co. v. Qualls, *supra*; Missouri K. & T. of Texas v. Dawson, 109 S. W., 1110.

For the error of the court in the charge given, the judgment is reversed and the cause remanded for another trial.

Reversed and remanded.

C. B. LIVESTOCK COMPANY v. PINK PARRISH ET AL.

Decided February 26, 1910.

Injunction—Dissolution—Appeal—Filing Transcript.

On an appeal from an order dissolving a temporary writ of injunction the transcript must be filed in the Court of Civil Appeals within fifteen days after the date of the order. This matter is jurisdictional, and the appellate court has no authority to extend the time even by agreement of parties.

Appeal from the District Court of Crosby County. Tried below before Hon. Jo. A. P. Dickson.

J. W. Burton, Lloyd A. Wicks and *H. C. Randolph,* for appellant.

W. E. Crawford and *L. W. Dalton,* for appellee.

SPEER, ASSOCIATE JUSTICE.—This is a motion by appellant for leave to file transcript, statement of facts and brief, and to advance the cause in an interlocutory injunction case. From the motion, it appears that the judge of the Fiftieth Judicial District, on December 18, 1909, sustained a motion to dissolve a temporary injunction theretofore granted by him, whereupon this appellant, the plaintiff below, gave notice of appeal, and two days later filed its appeal bond, but failed to file the transcript with the clerk of this court within fifteen days after the entry of such order. A sufficient excuse, if an excuse carr be heard, is made for this failure, and the appellees waive such filing and join in appellant's prayer asking that the transcript may be filed at this time. So that we are confronted with the naked legal question whether or not we have jurisdiction to entertain the appeal where the transcript is not filed within the time prescribed by law.

Ordinarily an appeal is perfected and the jurisdiction of this court attaches on the filing of the appeal bond, and that may be, and doubtless is, true under our present statute in cases of appeal from interlocutory orders in injunction cases. It is further ordinarily true that the failure to file a transcript within the statutory time is not jurisdictional, but may be waived. The reason for this is that the Legislature evidently so intended, as witness the language of article 1015 (Sayles' Texas Civil Statutes): "The appellant or plaintiff in error shall file the transcript with the clerk of the Court of Civil Appeals within ninety days from the performance (perfecting) of the appeal or service of the writ of error; provided, that for good cause the court may permit the transcript to be filed thereafter upon such terms as it may prescribe."

Prior to the Act of 1907 appeals were not allowed from interlocu-

tory orders in injunction cases. By that Act (General Laws of Texas, 1907, page 206), as amended by the Act of 1909 (General Laws of Texas, 1909, page 354), it is provided: "Any party or parties to any civil suit wherein a temporary injunction may be granted, refused or dissolved under any of the provisions of this title in term time or in vacation, may appeal from the order of judgment granting, refusing or dissolving such injunction to the Court of Civil Appeals having jurisdiction of the case; but such appeal shall not have the effect to suspend the enforcement of the order appealed from unless it shall be so ordered by the court or judge who enters the order, provided the transcript in such cases shall be filed with the clerk of the Court of Civil Appeals not later than fifteen days after the entry of the record of such order or judgment granting, refusing or dissolving such injunction." In order to expedite such appeals the next succeeding section of the Act dispenses with the necessity for briefing such case in the Court of Civil Appeals or Supreme Court, and directs that the same may be heard in said courts on the bill and answer and such affidavits and evidence as may have been admitted by the judge granting, refusing or dissolving such injunction. Another section provides that such an appeal shall have priority in the Court of Civil Appeals or Supreme Court over other pending cases. In view of the emphatic language above quoted as to the time for filing the transcript, and the evident purpose of the Legislature that such appeals should in no event be long delayed, we think it quite clear that we have no discretion to permit the filing of the transcript after the time provided by law has elapsed. If we could for good cause extend the time one week, we might do so for any number of weeks, and thus not only delay the hearing of such appeal, but probably do so beyond the time when the case proper would be heard on its merits in the trial court, whereas the appeal to be of value to either party should be determined before the case is reached for trial below. While this consideration of course is in no manner jurisdictional within itself, it at least affords a reason, if one were needed, why the Legislature provided that the transcript on appeal from an interlocutory order should not be filed in this court after fifteen days from the date of the order appealed from.

The motion is therefore overruled, and, of our own motion, the appeal dismissed.

Motion overruled and appeal dismissed.

NETTIE COFFMAN v. TEXAS MIDLAND RAILROAD.

Decided February 26, 1910.

1.—Negligence—Death—Causal Connection—Insufficient Evidence.

In a suit by a surviving widow against a railroad company for the death of her husband, it was shown by the evidence that deceased alighted at one of defendant's stations on a dark night for the purpose of going to the house of a relative about 150 yards distant; he was afterwards found in an uncon-

scious condition lying at the bottom of a gully or gulch and near the railroad bridge that crossed the same in the direction of the relative's house; he died next morning without explaining how he came to fall in the gully, and there was no evidence explaining the occurrence. Held, the facts that there were nails extending from some of the planks of the bridge, and that the bottom of one of deceased's shoes was torn, together with other facts above stated, were not sufficient to warrant the jury in inferring that the deceased was walking over the bridge and struck his shoe against a nail projecting therefrom and was caused to fall from the bridge, and the court properly instructed a verdict for defendant.

2.—Same.

The causal connection between a negligent act or omission and an injury must be proved; it can not be presumed.

Appeal from the District Court of Kaufman County. Tried below before Hon. F. L. Hawkins.

J. S. Woods and *Thos. R. Bond,* for appellant.—Under the rule of *res ipsa loquitur* the facts proven on the trial hereof by plaintiff, without explanation on the part of the defendant, authorized the question of plaintiff's right of recovery herein to be submitted to the jury for its determination. Missouri Pac. Ry. Co. v. Bridges, 74 Texas, 520; St. Louis S. W. Ry. Co. v. Smith, 49 Texas Civ. App., 1; Missouri, K. & T. Ry. Co. v. Hollan, 49 Texas Civ. App., 55; St. Louis S. W. Ry. Co. v. Hawkins, 49 Texas Civ. App., 545; Strange v. Bodcaw Lumber Co., 96 S. W., 152.

Res ipsa loquitur, rule of: 29 Cyc., 5928 and 623; Arkansas Tel. Co. v. Ratteree, 57 Ark., 429; Wood v. Wilmington City Ry. Co., 64 Atl., 246; Connor v. General Fire Extinguisher Co., 73 N. Y. App., 624; Kaples v. Orth, 61 Wis., 531; Leeright v. Ahrens, 60 Mo. App., 118.

The fact of the negligent maintenance of a dangerous and unsafe bridge for the use of pedestrians by a railway company in the middle of a street in a populous city, being established by evidence beyond dispute, the fact that deceased came to his death from said cause may be established by circumstantial evidence. Gulf, C. & S. F. Ry. Co. v. Hewett, 67 Texas, 473; Boehrens v. Brice, 52 Texas Civ. App., 221; Bonn v. Galveston, H. & S. A. Ry. Co., 82 S. W., 808; Hopkins v. Boyd, 18 Ind. App., 63; Leeright v. Ahrens, 60 Mo. App., 118; Hart v. Hudson River Bridge Co., 80 N. Y., 622; Reiley v. Atlas Iron Works, 83 Hun, 196; Basbeck v. Philadelphia Co., 31 Am. St., 563; Woodall v. Boston Elevated Ry. Co., 192 Mass., 308; Strange v. Bodcaw Lumber Co., 96 S. W., 152.

A. H. Dashiell and *Ogden, Brooks & Napier,* for appellee.

BOOKHOUT, ASSOCIATE JUSTICE.—This was a suit by appellant against the appellee to recover damages for the death of her husband, Dr. J. A. Coffman. At the close of the testimony in chief for plaintiff the defendant requested the court to instruct a verdict for defendant, which request was granted, and the jury, in accordance with such instruction, returned a verdict for defendant and judgment was so en-

tered. Plaintiff's motion for new trial having been overruled, she perfected an appeal.

The evidence showed that Dr. Coffman, the deceased, left Big Springs, in Howard County, on the morning of January 18, 1906, on the train over the Texas & Pacific Railroad for Terrell, and arrived in Terrell about nine o'clock that night. He got off the train at the Union Depot of defendant and the Texas Pacific Railway in Terrell about nine o'clock at night. The night was dark. He lived about eight miles north of Terrell, and had a relative living about one hundred and fifty yards north of the depot where he got off and on the east side of Callie Street. He was next seen by the witness, Art Carden, who testified: "I was traveling High Street, going east, coming home, and I heard a groaning, and went down to where it was and found Dr. Coffman in this gulch or ravine under the Texas Midland Railroad bridge, on the east side, lying about three feet from a perpendicular line up and down from the bridge. The gully must be twelve or fifteen feet deep—twelve feet, I will say." He further testified on cross-examination: "I was the first person to Dr. Coffman. No one was with him when I got there." Dr. Coffman was removed from the gully and taken to the home of his relative only a short distance away, where he died the next morning. The evidence does not disclose the whereabouts of Dr. Coffman or what he was doing from the time the witness McCloud saw him alight from the train at the depot until Carden discovered him in the gulch or ravine. Dr. Neely testified that the physician thought his shoulder was broken, but did not know positively, because he was in such a condition that they did not deem it advisable to make an examination. Dr. Davis testified that his shoulder was broken. He thought the injuries were produced by considerable force. He says: "Well, it was a considerable lick of some kind; there was considerable force in the injury." Mr. Dean testified that he saw Dr. Coffman after his death and did not remember but one bruise, and that was on his breast; the best of his recollection, it was on the left breast. The evidence fails to show how Dr. Coffman came to be where Art Carden found him, or in what way he received his injuries. He may have been murdered. He may have jumped off the bridge. He may have been knocked off. He may have been—and probably was—walking along Callie Street along the side of the railroad, and have fallen in the gulch. The proof shows that he was three feet north of the bridge, and it is also undisputed that this gully or gulch at this point was ten or fifteen feet wide and twelve to fifteen feet deep, and that the only way it could be crossed was over the railroad bridge.

The facts are quite similar to those passed upon by the Court of Appeals of New York in the case of Gardinier, Adm'r, v. New York Central Railway Company, reported in 9 N. E. Reporter, 182. In that case it was claimed that the railway company had failed to make its bridge safe for the public, and the complaint set out that the deceased, while attempting to go from Fonda to his home at Fultonville, and in attempting to approach and cross the bridge in the night-time, fell over the wing wall of the bridge and was killed. The court, in its opinion, says: "The evidence shows that he was found between

eleven and twelve o'clock of the night of that day, lying on the track under and near the bridge, badly hurt. The physician, who was soon in attendance, discovered slight superficial scalp wounds, no broken bones, but 'he was suffering from shock-concussion,' and from this cause soon after died. He was hardly able to make a sound, soon became unable to speak, and gave no explanation of the circumstances which led to his condition. The same witness testified that the injury was such as might have been caused by falling from the abutment of the bridge on the railroad track, or from a car, or by a blow, 'but the probability was, from the general condition of the man, that it was a fall.' . . . It is evident that the jury supplied an important but unproven fact by mere surmise, and not on inference. They assumed that the deceased was at the wing wall going towards, or was on, the bridge when the accident occurred. But of this there is no evidence. He was not seen at the bridge or upon it at its approaches. The record does not show that he was, during the evening, even going towards the bridge or his home, which lay beyond the bridge, or that he was intending to do so. There was literally no evidence to show how the deceased came to the place where he was found. We find, therefore, that the appellant's counsel is right in the assertion that there is no evidence that the deceased was 'on the bridge that night, or that he was seen going in that direction.' It could, therefore, only be conjectured that the intestate was upon the wall of the bridge, but there was no basis in the evidence to support the conclusion, and without that fact established the condition of the bridge becomes unimportant."

In the case now before us there is no evidence that Dr. Coffman was on the bridge. He made no explanation after being injured of the circumstances which led to his being in the gully where Art Carden found him. It is only a surmise that he was walking over the bridge and fell therefrom. As said in Texas & Pac. Railway v. Shoemaker, 98 Texas, 451, "This fact of causal connection between an alleged negligent act or omission and an injury can no more be presumed than can the act or omission itself."

Appellant contends that the jury could infer from the facts that Dr. Coffman was walking over the bridge and struck his shoe against a nail projecting from a plank, and was thereby caused to fall therefrom. It was shown that he had a relative living a short distance north of the bridge, and the bridge was on the route from the depot to the home of said relative, and that there were nails extending from some of the planks of the bridge. It was shown that the bottom of one of deceased's shoes was torn. The jury could not, from these facts alone, infer that Dr. Coffman was walking over the bridge and struck his shoe against a nail projecting therefrom, and was caused to fall from the bridge, producing the injuries which resulted in his death. Under the facts the doctrine of *res ipsa loquitur* does not apply, as is contended by the appellant. We conclude that the court did not err in instructing a verdict for defendant.

The judgment is affirmed.

Affirmed.

D. T. GARTH v. J. W. STUART ET AL.

Decided February 26, 1910.

1.—Notice—Possession by Tenant—Unrecorded Deed.

A debtor conveyed a town lot to a third party who neglected to put his deed on record; subsequently a judgment was obtained against the debtor and the same was duly abstracted and recorded; at the time of the conveyance to the third party the debtor had a tenant in actual possession of the lot who thereupon attorned to the third party or his vendee and thereafter paid him the monthly rentals as they accrued; this was the situation at the time the judgment was obtained and recorded and the land sold under execution issued on said judgment. Held, the judgment creditor and the purchaser at execution sale were charged with notice of the unrecorded deed by reason of the possession of the tenant holding under the third party.

2.—Same—Possession is Equivalent to Registration.

It is incumbent on one about to buy land to inform himself of the rights of the occupant or of the landlord of the occupant at that very time; he must not rest on the assumption that parties are occupying under the same right as formerly.

3.—Judgment Lien—Homestead Exempt.

A homestead is not subject to a judgment lien.

Appeal from the District Court of Freestone County. Tried below before Hon. B. H. Gardner.

D. T. Garth and *Alexander, Hogsett & Gresham,* for appellant.—The court erred in overruling the first assignment of error. Mainwarring v. Templeman, 51 Texas, 205; Turner v. Cochran, 94 Texas, 480; Barnett v. Squyres, 93 Texas, 193; Whitaker v. Farris, 45 Texas Civ. App., 378; R. E. Bell Hardware Co. v. Riddle, 31 Texas Civ. App., 411; Hawley v. Bullock, 29 Texas Civ. App., 222.

As against a creditor whose lien has been fixed upon land by legal process (by record of abstract of the judgment) against his debtor, the holder of a prior unrecorded deed from such debtor has the burden of proving notice of his right to such creditor lienholder at the time of or before the attachment of the lien, and such notice was not only not proved, but was not alleged in this cause. Turner v. Cochran, 94 Texas, 480, and authorities therein cited; Chalkey v. Cooper, 56 Texas Civ. App., 251; Rippetoe v. Dwyer, 65 Texas, 708; Brown v. Roland, 11 Texas Civ. App., 648; Denison Lumber Co. v. Milburn, 107 S. W., 1161.

The court erred in rendering judgment for intervener Chumney and in not rendering judgment for plaintiff because under the undisputed evidence the court should have held that Garth was a purchaser for value of the property in controversy, and had no notice, actual or constructive, of the unrecorded deed held by Persons. Mainwarring v. Templeman, 51 Texas, 205; Turner v. Cochran, 94 Texas, 480; Barnett v. Squyres, 93 Texas, 193; Whitaker v. Farris, 45 Texas Civ. App., 378; R. E. Bell Hardware Co. v. Riddle, 31 Texas Civ. App., 411; Hawley v. Bullock, 29 Texas, 222; Willis v. Pounds, 6 Texas Civ. App., 512; Paris Grocer Co. v. Burks, 101 Texas, 106; Rippetoe v. Dwyer, 65 Texas, 708; Brown v. Roland, 11 Texas Civ. App., 648.

As against a creditor whose lien has been fixed upon land by legal process against his debtor, the claimant under a prior unrecorded deed from such debtor has the burden of proving that he was a purchaser in good faith and for a valuable consideration, which proof has not been made in this case. Bremer v. Case, 60 Texas, 151; Turner v. Cochran, 94 Texas, 480; Moody v. Ogden, 31 Texas Civ. App., 395; McAdoo v. Williams, 54 Texas Civ. App., 562; Weinert v. Simmang, 29 Texas Civ. App., 435.

W. R. Boyd and *W. J. Bryant,* for appellees.

RAINEY, CHIEF JUSTICE.—This is an action of trespass to try title brought by D. T. Garth against J. W. Stuart, to recover a certain lot of land situated in the town of Teague, Freestone County, Texas. Stuart answered and disclaimed any interest in the title to the land, except as leaseholder under and through George D. Hunter. W. T. Chumney intervened, claiming a fee simple title, and that Garth was asserting claim under a sheriff's deed which cast a cloud on intervener's title, and asked that Garth's deed be canceled and his title be established. The cause was tried without a jury and judgment rendered by the court for intervener against plaintiff, and recognizing intervener's [defendant's?] right to possession under his lease. Garth appeals.

The trial court filed conclusions of fact which are adopted by this court. Said conclusions are as follows:

"It is admitted, and the court so finds, that defendant J. W. Stuart is only the tenant holding under a written lease for one year, with privilege of renewal, and is entitled to possession of the premises during the performance of his lease contract, regardless of the ownership of said premises.

"It is admitted, and the court so finds, that Geo. D. Hunter is common source of title to the premises in controversy.

"That L. W. Levy & Company, composed of L. W. Levy and Ben Sass, recovered a judgment against Geo. D. Hunter in the County Court of Freestone County on the 22d day of October, 1908, for the sum of $702.86, with interest thereon at the rate of ten percent per annum, which was unsatisfied at the time of sale of the property in controversy under execution.

"That L. W. Levy & Company caused an abstract of such judgment to be recorded in the judgment record in Freestone County on November 5, 1908, and that said judgment or abstract of same is properly recorded and properly indexed in volume 2, page 49, of the judgment records of said county, but not in volume 3.

"That there are three volumes of the judgment records for Freestone County kept in the office of the county clerk; that each of said records has a separate index kept in the front of each volume and used only for such volume, and that there is no separate index kept for all of said records.

"That the judgment recorded by Levy & Co. is only indexed in volume 2, and that volumes 2 and 3 were at the time being used by the clerk alternately for the purpose of recording abstracts of judgments, volume No. 1 being entirely filled. Volume 2 was printed in

the certificate form and No. 3 in the tabulated form, and otherwise there was nothing about No. 3 to show that No. 2 was being used at the time, and there is nothing about either form to indicate that another book might be in use except to those who might be familiar with the fact that there are two forms in use.

"That on December 17, 1908, L. W. Levy & Co. caused an execution to be issued out of the County Court upon said judgment, and same was levied upon lot No. 10 in block No. 107 in the city of Teague, and after proper notice same was sold on February 2, 1909, plaintiff D. T. Garth being the purchaser, and that plaintiff holds sheriff's deed properly executed, acknowledged and recorded, dated February 2, 1909, conveying all the interest of Geo. D. Hunter in said lot. Said proceedings were in regular form.

"That Geo. D. Hunter and wife, by deed duly executed, dated August 19, 1908, conveyed said lot No. 10 in block No. 107 to W. C. Persons for a valuable consideration. That W. C. Persons, by his deed duly executed and for a valuable consideration, on the 28th day of October, 1908, conveyed said lot No. 10, block No. 107, to W. T. Chumney, and that Chumney filed both said deeds for record in office of the county clerk of Freestone County on the 9th day of November, 1908.

"That defendant J. W. Stuart entered into a written lease contract with Geo. D. Hunter on the 16th day of June, 1908, for said premises for a period of one year from said date, Stuart paying $75 cash in advance for the first month, and executed and delivered to Geo. D. Hunter eleven negotiable promissory notes for $75 each, payable on the 17th day of each succeeding month until same was paid, with the privilege of renewal of said lease, and that on or about October 20th Stuart paid to said Persons one of said rent notes, due October 17th, Persons stating to Stuart at the time that he then owned the property and held a deed to same from Hunter. That Stuart paid the rent notes due for the months of November and December, 1908, and January, 1909, to W. T. Chumney, and both Chumney and Persons stated to him that Chumney owned the premises. That W. T. Chumney holds the rent contract and all unpaid rent notes given by Stuart, same having been assigned by Hunter to Persons and by Persons to Chumney, and agrees to be bound by the rent contract for the premises, having agreed at the date of his purchase to respect same. There was no new rent contract between Stuart and Persons or Chumney, and no formal attorning as tenant other than implied in notice of conveyance by Hunter and payment of rent notes as they fell due, and no objection from Stuart on being informed of sale by Hunter to Persons and by Persons to Chumney."

The appellant presents the following assignment of error and proposition, viz.: "The court erred in his first conclusion of law, as stated in his filed findings and conclusions, wherein he concluded that notice to Stuart that Hunter had sold and deeded the premises to Persons, with no objection or protest from Stuart, together with payment of the rent note, was sufficient to put the judgment creditor of Hunter on notice that Hunter had parted with all interest in the property, because, plaintiff says, the burden was upon intervener to show that

Levy & Company had either actual or constructive knowledge of the unrecorded deed, and no such proof was made, nor does the evidence tend to show that Stuart would have advised the judgment creditor (on inquiry) any further than that his occupancy was under a lease contract made with Hunter." Proposition: "The lien of the judgment in favor of Levy & Company against Hunter attached to the lot in question regardless of the unrecorded deed from Hunter, and Garth, as a purchaser of the lot at execution sale under said judgment, acquired title to the lot unaffected with notice, actual or constructive, of the unrecorded deed from Hunter."

We are of the opinion that the trial court did not err in holding that Levy & Company were chargeable with notice of appellee's title to the land. When Levy & Company filed their abstract of judgment against Hunter, the title had several months prior thereto passed out of Hunter and vested in Chumney, intervener, though his deed had not then been recorded, but Stuart was in open and visible possession of the lot as tenant attorning to the purchaser of the Hunter title. Stuart was holding the premises under a written lease from Hunter on August 19, 1908, when Hunter conveyed to Persons, and the lease and notes for the monthly rent not paid were transferred to Persons, and when Persons conveyed to Chumney he transferred the lease and notes to him. Stuart paid one month's rent to Persons on October 20, 1908, and subsequently paid to Chumney the notes due for November, December and January. There is no proof that Levy & Company knew that Stuart was holding under Hunter when Hunter owned the title, and that they had no notice of Hunter's conveyance and were resting on the belief that Stuart was Hunter's agent. But if Levy & Company did know that Stuart was Hunter's tenant at one time, when they went to subject the land to their claim, they could not rely on such knowledge, but it was their duty to inquire of the tenant in possession as to his holding. This they did not do.

In Mainwaring v. Templeton, 51 Texas, 205, it is said: "Under our statute the rule has become settled that possession, either in person or by tenant, is equivalent to registration. . . . If the possession be sufficiently open and definite, whether it be in person or by tenant, it is incumbent on one who undertakes to acquire rights in the land to inform himself of the rights of the occupant, or of the landlord of the occupant. The purchaser should not be excused from inquiry unless there be something more to mislead him than his own assumption that parties occupy under the same right as formerly."

In Paris Grocery Co. v. Burks, 101 Texas, on page 112, Mr. Justice Williams says: "Nor do we lay down any doctrine inconsistent with the decision in Mainwaring v. Templeton, 51 Texas, 205, which holds that where the owner of land, on which he has a tenant, conveys to another to whom the tenant attorns, no other change of possession is necessary to give notice of the title of the purchaser."

In Collum v. Sanger, 98 Texas, 162, Mr. Gaines, Chief Justice, says: "In the recent case of Ramirez v. Smith, 94 Texas, 184, it was expressly stated as a general rule that the fact that the possession of one holding land is consistent with the recorded title does not exempt a purchaser from the duty of inquiring of him as to any other title.

We think it a safe and salutary rule to require of a prospective purchaser of land to ascertain whether any other be in occupancy of it; and, if there be such possession, to go to the possessor and ascertain the nature and extent of his claim. Possession is evidence of title, and it seems to us that common prudence and common honesty demand this course. If so, the possession should be notice to him; and, if notice to a purchaser, it is notice to a creditor."

Garth holding the junior title, the burden was on him to show want of notice of the transfer of Hunter's title; not having shown this, the court correctly rendered judgment for Chumney. The judgment is affirmed.

ON MOTION FOR ADDITIONAL FINDINGS.

We are asked by appellant to make additional findings of fact, which we do as follows:

The judgment of Levy & Company v. Hunter was duly abstracted, recorded and indexed in the county records of Freestone County, Texas. We are asked to find that the deed from Hunter and wife to Persons was not delivered until November 4, 1908. This deed was dated August 19, 1908, and acknowledged same day by Hunter, and on November 4, 1908, acknowledged by his wife. Stuart paid to Persons the October rent about the 21st of October, 1908. Hunter may have delivered the deed when he executed and acknowledged it and surrendered the right to and control over the premises, so we are not prepared to find that the deed was not delivered until November 4, 1908. If Hunter and wife were occupying the premises as indicated by the following clause in the lease contract, "that the party of the first part shall retain enough room in said building as a homestead during the life of said lease," when they sold to Persons, then no lien was fixed by the abstracting of said judgment, as the premises were not subject to the claims of creditors.

Affirmed.

Writ of error refused.

MARCH, 1910.

WESTERN UNION TELEGRAPH COMPANY v. R. B. RICH.

Decided March 1, 1910.

1.—Telegraph Company—Delay in Delivering Message—Infectious Disease—Mental Anguish.

In view of the infectious and fatal character of yellow fever in this State in 1903, it can not be said, as matter of law, that a person of ordinary firmness, intelligence and courage would not have suffered mental anguish by having to remain in a community in which the disease had appeared.

2.—Same.

Pleading and evidence considered, and held to show a cause of action

against a telegraph company for negligent delay in delivering a telegram warning plaintiff of the existence of yellow fever in a certain city and advising him to abandon an intended visit there, whereby plaintiff was caused to visit said city and forced to remain therein nineteen hours, thereby suffering mental anguish from fear of contracting the disease and from fear of being quarantined.

Appeal from the District Court of Houston County. Tried below before Hon. B. H. Gardner.

Young & Stinchcomb, for appellant.—Mental anguish suffered by the appellee on account of fear that he would contract yellow fever and on account of fear that he would be placed under quarantine and kept from his family and his business for an indefinite length of time, was not the natural and probable result of a failure to deliver the message to the appellee, and was not reasonably within the contemplation of the parties to the message contract at the time it was made, and the plaintiff's petition failing to show any notice to the agent of the appellant that accepted the message for transmission, other than that contained in the message, the general demurrer and both special exceptions should have been sustained. Western U. Tel. Co. v. Murray, 29 Texas Civ. App., 207; Western U. Tel. Co. v. McFadden, 32 Texas Civ. App., 582; McAllen v. Western U. Tel. Co., 70 Texas, 243; Western U. Tel. Co. v. Smith, 76 Texas, 253; Western U. Tel. Co. v. Bryant, 46 N. E., 358; Western U. Tel. Co. v. Henley, 54 N. E., 775.

The appellee never came in contact with yellow fever or any other contagious or infectious disease, never met or saw any one that had yellow fever or any other contagious or infectious disease; therefore the mental anguish he suffered, if any, by reason of fear that he would contract yellow fever was without foundation and self-provoked, and for which no recovery can be had. Akard v. Western U. Tel. Co., 44 S. W., 538; Morrison v. Western U. Tel. Co., 24 Texas Civ. App., 347; Western U. Tel. Co. v. Taylor, 81 S. W., 69.

J. W. Madden and *Adams & Adams,* for appellee.—In an action against a telegraph company for delay in delivering a message warning the sendee not to come to a city on account of the presence of yellow fever, which delay resulted in his going there and remaining about eighteen hours before he could get away, the mental anguish suffered by him because of his exposure to the danger of contracting the disease was a natural and probable result of the delay in delivery and a proper element of damages, though after events showed that he was in no danger of contracting the fever Rich v. Western U. Tel. Co., 110 S. W., 93.

Whatever may arise in the usual course of things from the failure to accomplish the purpose indicated by the terms of the message may be considered within the contemplation of the parties at the time the contract was made as being the probable result of the breach of it, and for this the party who fails to comply is held responsible. Western U. Tel. Co. v. Edmondson, 91 Texas, 209; Western U. Tel. Co. v. Edsall, 74 Texas, 333; Western U. Tel. Co. v. Bowen, 84 Texas, 478.

PLEASANTS, CHIEF JUSTICE.—This suit was brought by appellee against appellant to recover damages for the alleged negligent failure of appellant to make reasonably prompt delivery of a telegram received by appellant at San Antonio, Texas, for transmission and delivery to appellee at Crockett, Texas.

The telegram was sent from San Antonio on October 21, 1903, at 8:20 a. m., was received at Crockett at 8:30 a. m. of that day, and was delivered to appellee's wife about 2 p. m. on said date. Appellee had arranged to leave Crockett on that morning and go to San Antonio, and the telegram was sent for the purpose of informing him that there was yellow fever in San Antonio and advising him not to come there. If the telegram had been delivered with reasonable promptness appellee would have received it before he left Crockett, and would not have gone to San Antonio. Not knowing of the existence of yellow fever, he went on to San Antonio, and was compelled to remain there for about nineteen hours before there was a train upon which he could return home. He claims to have suffered mental anguish while in San Antonio because of the fear that he would contract yellow fever and the fear that he might be quarantined and kept from his home and business for an indefinite period. The agent of appellant at San Antonio, at the time he received the message for transmission, was fully informed as to the purpose for which it was sent and the necessity of its delivery to appellee before the train from Crockett to San Antonio left Crockett. The petition alleges the above facts and seeks to recover, in addition to the expenses of appellee's trip, damages in the sum of $1,500 for the alleged mental anguish suffered by him.

The defendant answered by general demurrer and general denial, and by special exceptions and special pleas, to the effect that the facts show that there was no reasonable cause for the mental anguish claimed to have been suffered by appellee, and if he suffered such anguish it was purely imaginary and self-provoked.

The trial in the court below without a jury resulted in a judgment in favor of the plaintiff for $122.50, itemized as follows: $22.50, expenses of trip to San Antonio and return; $50 for mental anguish suffered by appellee because of fear that he would contract yellow fever, and $50 for his mental anguish because of his fear that he would be quarantined and kept from his family and business.

The evidence establishes the facts alleged in the petition as before set out, and the finding of the trial court that appellant was guilty of negligence in failing to deliver the telegram before the appellee left Crockett for San Antonio, and that if the telegram had been so delivered appellee would not have gone to San Antonio, is not questioned by appellant.

But it is urged under appropriate assignments that the judgment should be reversed because the facts alleged in the petition and shown by the evidence are not sufficient to charge appellant with notice that, as a probable result of its failure to make timely delivery of the telegram, appellee would suffer the mental anguish for which damages were awarded him by the trial court.

The evidence shows that there were only three known cases of yel-

low fever existing in San Antonio during the time appellee was kept there and that the nearest of these cases to the place at which appellee remained while in the city was about a mile. Appellee did not come in contact with any one suffering from yellow fever, and did not contract that or any other disease while in San Antonio. The disease was not regarded by the State health officer as epidemic in said city during the time appellee was there, and no State quarantine was put in effect against the city until the day after appellee left for home. Only thirty-eight cases were reported to the health officer during the time the fever existed there. Of these cases fifty percent proved fatal.

The fact that yellow fever is a contagious or infectious and, in a large percent of cases, a fatal disease, is a matter of general knowledge, and is abundantly established by the evidence in this record. It is also a matter of common knowledge that the methods of preventing the spread of the disease are vastly more effective now than they were in 1903 when this fever was discovered in San Antonio, and that at that time whenever yellow fever was discovered in a community the fear that it would become epidemic was almost universal; and in view of its fatal character we do not think it can be said, as a matter of law, that a person of ordinary firmness, intelligence and courage would not have suffered mental anguish by having to remain in a community in which the disease had appeared. The agent of appellant knew the purpose for which the telegram was sent, and we think he might reasonably have anticipated that if it was not delivered promptly appellee would go to the infected city in ignorance of the fever, and that when he discovered the fact that there were cases of yellow fever in the city he would suffer mental anguish through fear of contracting the disease. The fact that it may have subsequently developed that he was in no actual danger is immaterial. If he suffered from a reasonable apprehension of contracting the disease under the circumstance as then known to him and to the appellant, the latter is liable for the mental anguish thus caused by its failure to comply with its contract to use reasonable care to make timely delivery of the telegram.

We think it also follows from the facts before stated that appellee's apprehension that he would, by the enforcement of quarantine regulations, be kept from his business and family, was such a reasonable and probable result of appellant's negligence in the matter of the delivery of the telegram as would render it liable for the mental anguish of appellee caused thereby.

The evidence shows that appellant's agent at Crockett was well acquainted with appellee, and it is a reasonable inference from the facts in evidence that said agent knew that appellee had a wife and business at Crockett. Such being the evidence, we think that the mental anguish suffered by appellee because of his fear that he would be quarantined and kept from his home and business should be regarded as being reasonably in contemplation of the parties as a probable result of appellant's failure to comply with its contract.

What we have said disposes of all the questions raised by the sev-

eral assignments presented in appellant's brief, and, without discussing the assignments in detail, they are all overruled.

The judgment of the court below is affirmed.

Affirmed.

Writ of error refused.

W. R. KEMP v. A. H. EVERETT.

Decided March 2, 1910.

1.—Findings—Failure to Make—Bill of Exceptions.

Failure of the court to make findings of fact and law, though the record show a request that he do so, is not ground for reversal in the absence of a bill of exceptions reserved on such failure.

2.—Same.

Though the statute gives the judge ten days after adjournment in which to file his conclusions, Act of May 14, 1907, Laws Thirtieth Leg., p. 446, and bills of exception could only be filed in term time unless by order entered on the docket granting time after adjournment, it seems that the judge would have power to allow such bill after adjournment, the default complained of not occurring during the term.

Appeal from the District Court of Blanco County. Tried below before Hon. Clarence Martin.

L. Koenige and *Will G. Barber,* for appellant.—It is the duty of a trial court, whenever requested so to do, to file conclusions of law and fact in the cause. Rev. Stats., art. 1333; Werner Stave Co. v. Smith, 120 S. W., 247; Wandry v. Williams, 103 Texas, 91.

N. T. Stubbs and *Geo. E. Shelley,* for appellee.—Upon appeal, the Court of Civil Appeals will not consider an assignment of error complaining of the failure of the trial court to file findings of fact and conclusions of law, in the absence of a proper bill of exceptions in the record presenting such complaint. Landa v. Heermann, 85 Texas, 1; Cotulla v. Goggan, 77 Texas, 32; Lumpkin v. Marress, 102 S. W., 1169; Texas & P. Ry. Co. v. Shawnee Cotton Oil Co., 55 Texas Civ. App., 183.

RICE, ASSOCIATE JUSTICE.—Appellee obtained judgment at the February term, 1909, of said court against appellant for the sum of $1,428.35, with interest and costs of suit, and for the foreclosure of an attachment lien upon certain tracts of land therein described, from which this appeal is prosecuted.

There is no statement of facts in the record, and it appears by a recitation in the judgment that appellant requested the court to file his conclusions of fact and law, but the transcript fails to disclose any such findings by the court, and the only error assigned is the failure of the court to file such conclusions of law and fact. No bill of exceptions was taken to the failure of the court to file same, but it is urged on the part of appellant that, since the Act of the Thirtieth Legislature, p. 446, grants the right to county and district judges to file their conclusions of fact and law at any time within ten days

after the adjournment of the term, when demand is made therefor, that it is not necessary to except to the action of the court in failing or refusing to so file its conclusions of fact and law, in order to have the same reviewed by this court on appeal, but that such failure, in the absence of a bill of exceptions, when the request so to do is otherwise shown by the record, requires a reversal of the judgment. While, on the contrary, appellee insists that this court can not consider an assignment of error complaining of the failure of the trial court to file its findings of fact and conclusions of law in the absence of a proper bill of exceptions in the record presenting such complaint. But, while we think the recital contained in the judgment, as above set out, was a sufficient request on the part of appellant for such findings, still there is nothing in the Act of 1907 dispensing with the necessity for a bill of exceptions to the failure or refusal of the court so to do, in order to obtain a review on appeal on account thereof. The uniform practice, as heretofore declared by the decisions of the Supreme Court, under article 1333 of the Revised Statutes, has been not to consider such failure or refusal on the part of the court to file its conclusions of fact and law, unless the point was duly preserved by bill of exceptions taken thereto. See Cotulla v. Goggan, 77 Texas, 32; Landa v. Heermann, 85 Texas, 1; Hess v. Dean, 66 Texas, 663; Glass v. Wiles, 14 S. W., 225; Lumpkin v. Marress, 102 S. W., 1169; Texas & P. Ry. Co. v. Shawnee County Oil Co., 55 Texas Civ. App., 183, 118 S. W., 776. And this rule seems to generally obtain in other jurisdictions. See Vol. 2 Cyc., 730h.

While it is true that in Werner Stave Co. v. Smith, 120 S. W., 247, and in Wandry v. Williams, 103 Texas, 91, 124 S. W., 85, it was held reversible error on the part of the court to fail or refuse, upon proper request, to file its conclusions of law and fact within the ten days, as required by the Act of 1907, still, in each of these cases the point was properly presented for review by bill of exception taken to the action of the court in refusing and failing so to do. So that said cases are in line with the former holdings of the court on this subject, and are not, in our judgment, authority in support of the contention urged by appellant. He, however, contends that, since the Act in question grants the court ten days within which to file its conclusions, and that no failure can be shown until after said time has expired, when it is too late to prepare and file a bill of exceptions, even though it should be deemed necessary so to do, that, therefore, none should be required.

We are not prepared to agree with counsel for appellant that the court would have no authority or power, after the expiration of the ten days, to grant a bill of exception to its failure or refusal to file its conclusions of fact and law when such bill was opportunely presented for its consideration. It is true that the statute with reference to the presenting and filing of bills of exception requires that the same shall be presented to the judge for his allowance and signature during the term and within ten days after the conclusion of the trial, and we are aware that it has been frequently held by the courts that, unless this statute is strictly complied with in this respect, the bill will not be considered. See Lockett v. Schurenberg, 60 Texas, 610; King v.

Sassman, 54 S. W., 304; Harper v. State, 41 Texas Crim. App., 353, 55 S. W., 178; San Antonio & A. P. Ry. Co. v. Holden, 23 Texas Civ. App., 144, 55 S. W., 603; Western Union Tel. Co. v. Rowe, 44 Texas Civ. App., 84, 98 S. W., 228. Yet these decisions were made with reference to matters occurring during the progress of the trial, and had and could have no reference to matters occurring after the adjournment of the term; and since their rendition the present statute under consideration has been passed, whereby the court now has the right to file its conclusions at any time within ten days after the adjournment of the term. So that, to sustain appellant's contention, we must not only disregard the line of cases holding that, in order to review the action of the court in failing to file its conclusions within the prescribed period, it is necessary to preserve the point by bill of exception, but must also hold that no bill can properly be presented after the adjournment, which we are not inclined to do. Here there is no effort shown on the part of appellant to have the court comply with his request during the period granted to it after adjournment, and he relies merely on the failure of the court to act in the matter. It has been held in this State in Williams v. Dean, 38 S. W., 1024, that where the judge adjourned the court before the time allowed by him to perfect the bill of exceptions had expired, the appellant will not be denied relief on the ground that the bill was not approved and filed before the adjournment; that, while it had no power to consider the bill as a part of the record, the appellant nevertheless was entitled to relief, and the only relief that could be afforded him was to reverse and remand the judgment. In Bradford v. Knowles, 11 Texas Civ. App., 572, 33 S. W., 149, the same doctrine is announced. In Stanford v. State, 42 Texas Crim. App., 343, 60 S. W., 253, where the bill of exceptions was presented to the trial judge within the time required by law, but was not signed by him nor filed during the required time, because he was forbidden by his physician to read the bill on account of sickness, it was held that the bill would be considered on appeal, since the failure of the court to sign the same was not due to any negligence on the part of appellant.

It will be recalled that the Act of 1907 also permits the filing of bills of exceptions and statement of facts at any time within twenty days after the adjournment of the court, provided request is made therefor, and an order granting such request entered of record, so that the very statute extending the time within which the trial court may file its conclusions of fact and law likewise grants appellant the right to provide for just such a contingency as has arisen here, by procuring an order allowing him to file bills of exceptions within twenty days from and after the adjournment of the court. But if it should be urged that this statute was only intended, as may have been the case, to provide time for the preparation and filing of such bills of exception as may have been taken during the progress of the trial, yet we can see no good reason why the same should not be held to cover any matter occurring subsequent to the trial and within the period prescribed. Be this as it may, we are, however, inclined to believe that the Legislature did not contemplate nor intend that the

court should have the unrestrained power to fail or refuse to comply with such a request within the ten-day period allowed for filing its conclusions of fact and law, thereby depriving the party litigant of a substantial right, and at the same time deny him the privilege of a bill of exceptions to have such action reviewed, on the ground that a bill of exceptions could not be had after the expiration of said ten days. Certainly, wherever a right is given by law, some adequate means should be provided for its enforcement, otherwise the right itself is worthless, and if the statute itself is silent upon the subject, and fails to provide the method for a review of the action of the court when this right is disregarded by it, then, by implication, it seems to us, the aggrieved party should have the right to have such action of the court reviewed on appeal. The court under such circumstances, in our judgment, would have the inherent right to grant a bill of exceptions to its action; and, when timely presented, a failure or refusal on the part of the court to accord a proper bill of exceptions to its action, in our opinion, should be regarded as reversible error.

In the present case it appears that the judgment was rendered on the 6th of February, and that the court did not adjourn until the twelfth of said month, during which time there is nothing in the record to indicate that appellant sought to have the court comply with his request. In Lumpkin v. Marress, *supra,* where the record disclosed that the trial court failed to file its conclusions of law and fact through oversight on its part, and there was a failure on the part of appellant to call his attention thereto, it was said: "The term continued for more than a month after the request. The duties of a district judge are such that he ought not to be reasonably expected to keep such a matter in his mind. It is more reasonable to expect of counsel that they do not allow him, in the manifold and engrossing work which he has to perform, to overlook it. No excuse is offered by counsel for letting the matter rest, except that they confidently expected the judge would not let the term go by without filing the conclusions. We do not think that counsel did all that they could have done, nor that all the fault should be ascribed to the judge."

We think, in the absence of a bill of exceptions, that the failure on the part of the trial court to file its conclusions of law and fact can not be reviewed by us, and therefore overrule appellant's contention; and, no other error being assigned, the judgment of the trial court will be affirmed, and it is so ordered.

Affirmed.

MEXICAN CENTRAL RAILWAY COMPANY, LIMITED, v. OTTO LOCKE ET AL.

Decided March 2, 1910.

1.—Carriers—Consignor and Consignee.

In a suit for damages to goods shipped by rail, evidence that plaintiff shipped them to a third party, without other proof as to ownership, did not entitle him to maintain the action. The testimony constituted prima facie evidence of title in the consignee.

2.—Connecting Lines.

To recover damages against the terminal carrier the proof must show that the goods came into his possession.

Error from the District Court of Comal County. Tried below before Hon. L. W. Moore.

Waters Davis and *J. M. Goggin,* for plaintiff in error.—That ownership of property must be proved, see: St. Louis, S. F. & T. Ry. Co. v. Alverson, 52 Texas Civ. App., 321. That prima facie the title vests in the consignee, who alone has right of action: Haynie v. Missouri Pac. Ry. Co., 78 S. W., 1042; Sonia Cotton O. Co. v. The Red River, 30 So., 303, 6 Cyc., 511, and authorities there cited; Hutchinson on Carriers, sec. 177 (old ed., sec. 130). That consignor can not sue without showing facts to establish an exception to the general rule, see: Pennsylvania Co. v. Poor, 103 Ind., 553; Dressner v. Manhattan Co., 92 N. Y. Supp., 800.

Plaintiff could not recover against the Mexican Central Railway Company, Limited, without showing that the goods came into its possession. Hutchinson on Carriers, sec. 1346.

H. G. Henne and *J. R. Fuchs,* for defendant in error, Locke.—When it is plead and proved that the plaintiff was the owner of goods at the date of shipment, and it is not shown that the railroad company undertook to deliver the goods under a written contract to the consignee, the prima facie presumption arises that he continued to be the owner until the contrary is conclusively shown. East Line & R. R. Ry. Co. v. Hall, 64 Texas, 615; Hutchinson on Carriers, secs. 734 and 736; Finn v. Western R. Cor., 112 Mass., 528.

Plaintiff could recover against the Mexican Central Railway Company, Limited, by showing that the goods were at any time within its possession, or by showing that the Mexican Central Railway Company delivered the same, without showing when or how the goods came into the possession of the said defendant. Hutchinson on Carriers, sec. 761, p. 589.

Even though in an international shipment the initial carrier is liable for the injury occasioned to goods while in the possession of the connecting carrier, that does not affect the common-law liability of the last carrier, nor does it affect the presumption of law that, in the absence of proof, the goods sustained the injury while in the possession of the last carrier. Gulf, C. & S. F. Ry. Co. v. Edloff, 89 Texas, 458; Texas & P. Ry. Co. v. Barnhart, 5 Texas Civ. App., 601; Texas & P. Ry. Co. v. Adams, 78 Texas, 372; International & G. N. R. Co. v. Wolf, 3 Texas Civ. App., 383; Houston & T. C. Ry. Co. v. Ney, 58 S. W., 43; St. Louis & S. W. Ry. Co. v. Cohen, 55 S. W., 1123; Gulf, C. & S. F. Ry. Co. v. Malone, 25 S. W., 1077; Hutchinson on Carriers, sec. 761; 6 Am. & Eng. Ency. Law, 651; Gulf, C. & S. F. Ry. Co. v. Jones, 37 S. W., 208.

S. R. Fisher and *S. W. Fisher* (*King & Morris* and *Baker, Botts,*

Parker & Garwood, of counsel), for G., H. & S. A. Ry. Co. and I. & G. N. R. Co.

KEY, CHIEF JUSTICE.—Otto Locke brought this suit against the G., H. & S. A. Railway Company, the I. & G. N. R. Co., and T. J. Freeman, receiver of that company, and the Mexican Central Railway Company, Limited, to recover damages for alleged injuries sustained by a shipment of goods, consisting in two boxes of nursery stock and two bales of moss, alleged to have been shipped from New Braunfels, Texas, to Ortiz, Mexico.

Upon a plea interposed by him, Freeman, the receiver, was dismissed from the suit, and the trial between the plaintiff and the other defendants was had before the court without a jury. All the other defendants filed answers, that of the Mexican Central Railway Company consisting of a general demurrer and general denial. The trial court rendered judgment in favor of the other two defendants, and in favor of the plaintiff against the Mexican Central Railway Company, and that defendant has brought the case to this court upon a writ of error.

We sustain the first assignment of error which challenges the judgment on account of the insufficiency of the testimony. As charged in that assignment, the statement of facts is entirely without evidence showing that the property shipped belonged to the plaintiff. The plaintiff testified that he made the shipment of nursery stock, and that it was consigned to Pablo Hoffman at Ortiz, Mexico. He nowhere testified that the property belonged to him, or that he had any interest in it after it was delivered to the I. & G. N. R. Co. at New Braunfels, Texas. The testimony referred to constituted prima facie evidence of title in Pablo Hoffman, consignee. (Texas Cent. Ry. Co. v. Dorsey, 30 Texas Civ. App., 377, 70 S. W., 577; Haynie v. Missouri Pac. Ry. Co., 78 S. W., 1042; St. Louis, S. F. & T. Ry. Co. v. Alverson, 52 Texas Civ. App., 321, 114 S. W., 673, 6 Cyc., 511, and authorities there cited.)

It is also contended that the proof failed to show that the property referred to ever reached the line of the Mexican Central Railway and went into its possession. There is some testimony upon that subject, but it is very meager and unsatisfactory.

All the other assignments are overruled.

As between the plaintiff and the defendants T. J. Freeman, Receiver, the I. & G. N. R. Co. and the G., H. & S. A. Ry. Co., the judgment is affirmed, while as between the plaintiff and the Mexican Central Railway Company the judgment is reversed and the cause remanded for another trial.

Affirmed in part and in part reversed and remanded.

JOHN SANTIS V. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS.

Decided March 2, 1910.

Contributory Negligence—Question of Law.

A track worker was injured by being struck and thrown under the wheels by a trap door projecting from the side of a car on a passing gravel train. He knew of the approach of the train and of the projecting trap door, but erroneously supposed that he had stepped far enough from the track to clear it. Held, that there was no room for difference of opinion as to his contributory negligence, and a peremptory instruction to find for defendant was properly given.

Appeal from the District Court of McLennan County. Tried below before Hon. Marshall Surratt.

Eugene Williams and *W. B. Carrington,* for appellant.—There being at the least some evidence of defendant's negligence and at the least some evidence of plaintiff's freedom from contributory negligence, the case should have been submitted to the jury, although the trial court on motion for new trial might have afterward set aside the verdict, if not supported by sufficient evidence. Texas Brokerage Co. v. Barkley & Co., 49 Texas Civ. App., 632; Burnett v. Ft. Worth L. & P. Co., 117 S. W., 175; Johnston v. Drought, 22 S. W., 290; Stevenson v. Pullman Palace Car Co., 26 S. W., 112; Citizens Ry. Co. v. Griffin, 49 Texas Civ. App., 569.

E. B. Perkins and *Scott, Sanford & Ross,* for appellee.—There was no evidence of any negligence on the part of the appellee and the plaintiff's own evidence shows conclusively that he was guilty of contributory negligence in fact and as a matter of law. Galveston, H. & S. A. Ry. Co. v. Faber, 77 Texas, 153; Dayton Lumber Co. v. Stockdale, 54 Texas Civ. App., 611; Morris v. Travelers' Ins. Co., 43 S. W., 898; Washington v. Missouri, K. & T. Ry. Co., 36 S. W., 779; Parrish v. Frey, 18 Texas Civ. App., 271; House v. Robertson, 89 Texas, 681; Joske v. Irvine, 91 Texas, 574; Seery v. Gulf, C. & S. F. Ry. Co., 34 Texas Civ. App., 89; Wills v. Central Ice & Cold Storage Co., 39 Texas Civ. App., 483; Gulf, C. & S. F. Ry. Co. v. Shieder, 88 Texas, 163; Sanches v. San Antonio & A. P. Ry. Co., 88 Texas, 117.

KEY, CHIEF JUSTICE.—This is a personal injury suit in which the plaintiff sought to recover damages from the defendant on account of the fact that he was injured by a gravel train on defendant's road, which injury resulted in a loss of one of the plaintiff's feet.

The defendant charged in its answer that the plaintiff was not entitled to recover because of his own negligence, which contributed to his injury.

After hearing all the testimony, the trial court instructed a verdict for the defendant, which verdict was returned, and judgment entered accordingly, and the plaintiff has appealed.

No doubt the trial court instructed a verdict for the defendant for the reason that the undisputed testimony showed that the plaintiff was guilty of contributory negligence. We have carefully read the statement of facts and have reached the same conclusion. The grounds of negligence set forth in plaintiff's petition were as follows:

"That on or about May 14, 1907, plaintiff was employed as a section hand by defendant, working as such for defendant, that while in the performance of his duties as under the immediate direction of a boss or foreman, then and there the vice-principal of defendant, a train of gravel cars pushed by an engine of defendant approached the place where plaintiff was working, and defendant failed in its duty to provide plaintiff with a safe place to work, and said boss or foreman failed to keep a proper watch to warn plaintiff of the approach of said train; that while plaintiff was so engaged in his duties the employes in charge of said train negligently caused said train and a projection from one of said cars to run over plaintiff and against plaintiff with the result that one of his feet and a portion of one leg was mashed and mangled in such a manner as to require its amputation; that said train approached plaintiff while at his work in such a manner that he did not see and could not have seen and did not hear and could not have heard said train approaching; that there was no lookout at the end of said train, as was the duty of defendant to keep, and the engineer and fireman of the engine pushing said train did not keep a lookout to see plaintiff, and were thereby negligent, or, if defendant kept a lookout at the rear of said train which was approaching toward plaintiff, the engine being at the end farthest from him, or either said engineer or fireman kept a lookout, each of said lookouts was negligent and defendant was negligent in failing to warn plaintiff of the approach of said train, and defendant and each of said employes failed to sound a whistle or ring a bell giving notice of the approach of said train, as was its and their duty; that there was a projection negligently left extending by defendant and its employes on said train out from the side of one of said cars, which contributed to plaintiff's injury by running against him, as aforesaid, and that each of said failures and acts of defendant and its employes and said boss were negligence, by reason of which negligence and each act thereof, without negligence on the part of plaintiff, he was injured, all of said acts of negligence and each act thereof being the direct and proximate cause of plaintiff's injuries."

According to the plaintiff's own testimony, the gravel train in question had already passed where he was at work two or three times that day before he was injured. He knew that it had gone to the gravel pit for gravel, and he saw it returning when it was 300 or 400 feet from him. Then he and the remainder of the crew quit work and sought safety, but he failed to move far enough away from the track and was struck by something which was projecting from the side of one of the gravel cars. The train was backing, and the first car as it approached was a caboose, which did not strike the plaintiff, and he was struck by the projection referred to on the second car. He stated repeatedly that he saw the train approaching,

saw the projection referred to and that it was a trapdoor used for the purpose of loading and unloading gravel. The plaintiff's attorneys attempted to show that the projection referred to was not a trapdoor hanging down, but was what is called a "dozier," an implement used for the purpose of spreading gravel; and they put in evidence an averment in a former answer which had been abandoned by the defendant, to the effect that on the occasion in question there was a dozier on the gravel train and the plaintiff was aware of that fact and was guilty of contributory negligence in not getting far enough away to avoid contact with it. The plaintiff testified that he did not see any dozier on the car, and, though he could not state positively, said he was satisfied that he was hit by the trapdoor. He testified that when he saw the train approaching, and saw the trapdoor hanging down, or whatever the projection was, he stepped back what he supposed to be sufficient distance to avoid being struck, and then he turned his back, took out his pocket-knife and was preparing to cut a chew of tobacco when he was struck and injured.

While we think it appears with reasonable certainty that the plaintiff was struck by a trapdoor projecting from one of the cars, we consider it immaterial whether the projection was a trapdoor or a dozier. It is quite clear from the plaintiff's testimony that he saw the train approaching and saw the projection, but, notwithstanding those facts, and the further fact that he was an experienced railroad employe, he neglected to remove himself out of danger; and, instead of keeping a lookout for the projection on the car in order that he might avoid it, he turned his back and devoted his attention to a matter of much less importance to him.

Upon this state of facts we do not believe that reasonable room exists for difference of opinion among fair-minded persons upon the proposition that the plaintiff, on the occasion in question, failed to exercise such care for his own safety as persons of ordinary prudence would have exercised, under the same or similar circumstances. (Dayton Lumber Co. v. Stockdale, 54 Texas Civ. App., 611, 118 S. W., 805; Austin Electric Railway Co. v. Lane, 55 Texas Civ. App., 577, 120 S. W., 1011.)

No error has been shown and the judgment is affirmed.

Affirmed.

Writ of error refused.

ANTONIO SALAS ET AL. v. J. J. MUNDY.

Decided March 2, 1910.

1.—Partition of Estate—Subsequent Administration—Jurisdiction of County Court.

The fact that the heirs of an intestate partitioned the estate among themselves by decree of the District Court will not deprive the County Court of jurisdiction to grant letters of administration upon the estate at the instance of a creditor at any time within four years from the intestate's death, and to subject the property of the estate so partitioned among the heirs to the payment of debts.

2.—Same—Jurisdiction—Collateral Attack—Burden of Proof.

In a collateral attack upon an administrator's sale of land by heirs who

had previously partitioned the estate among themselves, the burden of proof is on them to show from the record in the administration proceeding that the probate court had no jurisdiction and that therefore the sale was void. The presumption is to the contrary.

3.—Same.

When letters of administration have been granted after the required notices have been given and the heirs make no contest in the matter, a conclusive presumption exists that the probate court acted upon proper and ample evidence.

4.—Community Debts—Administration on Wife's Estate.

Some community debts may be chargeable against the wife's separate estate and therefore will warrant administration on the same.

Appeal from the District Court of El Paso County. Tried below before Hon. James R. Harper.

Daniel M. Jackson, Lea & Ware and *Robt. T. Neill,* for appellants. —The Thirty-Fourth District Court having partitioned the estate of Leonor Flores on February 25, 1894, and set apart the land in controversy to Annie Lockwood, the status of the property was thereby fixed and the County Court was without jurisdiction to appoint an administrator thereafter on July 23, 1896; and the attempted sale by Horace B. Stevens so appointed was void. Moore & Son v. Moore, 89 Texas, 29; Goldstein v. Susholtz, 46 Texas Civ. App., 582; Floyd v. Watkins, 34 Texas Civ. App., 3; Solomon v. Skinner, 82 Texas, 345; Patterson v. Allen, 50 Texas, 26; Bledsoe v. Beiler, 66 Texas, 437; Buchanan v. Heirs of Thompson, 4 Texas Civ. App., 236; Byrd v. Ellis, 35 S. W., 1070; Heard v. McKinney, 1 Posey's U. C., 83; O'Brien v. Mahoney, 179 Mass., 200, 88 Am. St., 370; Hall v. Gabbert, 213 Ill., 208, 72 N. E., 806; notes to Smith v. Smith, 119 Am. St. Rep., 586.

The court erred in admitting over plaintiff's objection at the instance of defendant, Claim Docket No. 1, showing entry of claims of Kelley & Pollard, T. H. Swain, Dr. A. L. Justice, Dolan's Star Stables and Chas. T. Rice. Puckett v. Richardson Drug Co., 1 Texas Civ. App., 634; First Natl. Bank of Weatherford v. Bruce, 55 S. W., 126.

The separate property of Mrs. Flores was not chargeable with community debts. Rev. Stats., art. 2973.

The District Court had jurisdiction to make the partition and the creditors were not necessary parties thereto, and it was immaterial whether or not they had notice. Rev. Stats., arts. 1098, 3606, 3607 and 3625; Moore & Son v. Moore, 89 Texas, 29; O'Brien v. Mahoney, 179 Mass., 200, 88 Am. St. Rep., 370; Hall v. Gabbert, 213 Ill., 208, 72 N. E., 806.

A. G. Foster and *W. M. Peticolas,* for appellee.—If the heirs to this estate could by an agreed partition suit in the District Court, to which the creditors were not parties, deprive the County Court of its jurisdiction to administer the estate of this decedent, then our administration statutes are rendered nugatory and of no effect; it

follows imperatively that the partition suit could not affect the jurisdiction of the Probate Court. McIlwaine's Rev. Stats., art. 1869; Cooper v. Loughlin, 75 Texas, 524; Blinn v. McDonald, 92 Texas, 604; Templeton v. Ferguson, 89 Texas, 47; Ansley v. Baker, 14 Texas, 611; Green v. Rugely, 23 Texas, 542; Matula v. Freytag, 101 Texas, 357; Lynch v. Baxter, 4 Texas, 433.

Even if said partition decree could have ousted the Probate Court's jurisdiction, had the creditors participated therein, it could not in any way have affected their rights when they were not parties; one of their rights was to have administration for the purpose of paying debts. Cooper v. Mayfield, 94 Texas, 109.

The County Court sitting in probate, on considering Horace Stevens' application for letters of administration, decreed "It appearing that the allegations contained in his petition are true, that Leonor Flores died July 30, 1893, intestate, leaving real estate and unpaid debts, and it appearing that a necessity exists for administration of her estate," and appointed him administrator. This finding and appointment could not be attacked collaterally, as in this case, for any cause—even if the partition decree could have availed on a direct attack. Templeton v. Ferguson, 89 Texas, 47; Martin v. Robinson, 67 Texas, 368; Lyne v. Sanford, 82 Texas, 58; Crawford v. McDonald, 88 Texas, 626; Rutherford v. Stamper, 60 Texas, 449; Heath v. Layne, 62 Texas, 690; Cassels v. Gibson, 27 S. W., 725; Simpkins' Admr. of Estates in Texas, chap. 4, p. 23.

In order to collect debts due by an intestate, the remedy is by administration. To this there are two exceptions:

1. When the creditor has delayed until there has been distribution. Floyd v. Watkins, 34 Texas Civ. App., 3; Patterson v. Allen, 50 Texas, 23.

2. When there is only one debt; in such cases creditor may sue the distributees and heirs. Webster v. Willis, 56 Texas, 468; Bledsoe v. Beiler, 66 Texas, 437; Henderson v. Lindley, 75 Texas, 185.

This suit was in trespass to try title for a tract of land. Leonor Flores being admitted to be the common source of title, plaintiffs proved themselves the heirs of Leonor Flores. Defendant proved a regular administration on the estate of Leonor Flores and a deed to him from the administrator. This administration is attacked by plaintiff collaterally in this suit for the land, on the ground that the debts were community debts and not separate debts; on such collateral attack the law would presume that a necessity existed for the administration from the mere fact that the Probate Court so found, and incidentally that there were debts against the estate. Templeton v. Ferguson, 89 Texas, 47; Martin v. Robinson, 67 Texas, 368; Lyne v. Sanford, 82 Texas, 58; Dunn v. Taylor, 42 Texas Civ. App., 241; Crawford v. McDonald, 88 Texas, 626; Rutherford v. Stamper, 60 Texas, 449; Heath v. Layne, 62 Texas, 690; Cassels v. Gibson, 27 S. W., 725; Simpkins, Admr. of Estates in Texas, chap. 4, p. 23, chap. 5, p. 31.

If we assume that because these debts were to druggists, doctors and undertakers they were expenses of last sickness, we have also assumed that they were necessaries and for necessaries not only the

estate of the husband, but also the estate of the wife would be liable and therefore they were proper debts to support this administration. Rev. Stats., art. 3970; Speer on Married Women, 56; Christmas v. Smith, 10 Texas, 123; Magee v. White, 23 Texas, 180.

The decree of partition in the District Court if valid between the heirs was nevertheless invalid as to the creditors and ineffective to prevent their exercise of any remedy which the law gave them. Cooper v. Loughlin, 75 Texas, 524; Blinn v. McDonald, 92 Texas, 604; Templeton v. Ferguson, 89 Texas, 47; Ansley v. Baker, 14 Texas, 611; Green v. Rugely, 23 Texas, 542; Matula v. Freytag, 101 Texas, 357; Lynch v. Baxter, 4 Texas, 433.

JAMES, CHIEF JUSTICE.—This suit was begun by a petition in trespass to try title, filed June 1, 1908, by Antonio Salas and his wife, Refugio, and Wm. T. Lockwood and his wife, Annie, against Mundy for a tract of 43.23 acres in El Paso County.

Defendant pleaded not guilty, three and five years limitations, and improvements in good faith.

Plaintiffs, by supplemental petition, pleaded that a certain deed from Horace B. Stevens, administrator of Leonora Flores, to the defendant was fraudulent and void and so irregular in its execution and record that it can not avail defendant; that at the time said Stevens was appointed such administrator (if he was so appointed) said estate owed no debts and owned no property and the County Court of El Paso County was without jurisdiction to grant such administration; that all the land owned by the said Leonora Flores was partitioned and divided between these plaintiffs and others long before the letters were granted, and that the identical land sued for was partitioned to and owned by these plaintiffs at the time of the sale to defendant and he acquired no title by said administrator's deed that he can assert against these plaintiffs, and that said deed attempting to convey title is irregular and uncertain and does not show in what capacity and for what purpose the said Stevens was acting, and was not duly and properly recorded, and is null and void and of no effect, etc. Judgment was in favor of defendant.

The court filed conclusions, in substance, these: That Leonora Flores was the common source of title; she died July 30, 1893; she left surviving her Manuel Flores, her husband, and two children, these plaintiffs, Refugio Salas and Annie Lockwood, her only heirs; that on February 25, 1894, in the District Court of El Paso County said heirs, by an agreed judgment, partitioned the property, and the portion in controversy here was set apart to Annie Lockwood; that at her death Leonora Flores was indebted to at least six different parties in different amounts; that Horace B. Stevens regularly applied for letters on July 6, 1896, which application was regularly heard and granted and he was appointed administrator by the County Court of El Paso County, which court had jurisdiction, the order reciting: "It appearing that the allegations of the applicant's petition are true, that Leonora Flores, a resident of El Paso County, Texas, died July 30, 1893, intestate, leaving real estate in said county and unpaid debts, and that necessity exists for administration on

her estate, and that applicant is entitled to letters, and is not disqualified, therefore he is appointed." That Stevens regularly qualified on July 23, 1896, that inventory and appraisement were returned and approved by an order filed and recorded. That Stevens regularly made application to sell the land involved in this suit, which came on to be heard and was granted by order in due form and reciting that "this court having heard the evidence and being satisfied that a necessity exists for said sales, ordered, adjudged and decreed that said application be granted and that said premises (to wit, the land in this suit), be sold to pay the debts of said estate, at public sale on a credit of twelve months, on the first Tuesday in November, 1898, at the door of the courthouse of El Paso County, Texas." That an amended application to sell was regularly made with due notice, and that on March 31, 1899, the court by order granted the same, reciting that: "It appearing to the court that on October 1, 1898, the court ordered sale of the premises (the land in this suit) and that the administrator has been unable to sell at the time fixed, it is therefore ordered that the administrator sell said premises under said order on the first Tuesday in May, 1899, and if then unable to sell that said order shall be a continuing one and he shall sell thereunder on the first Tuesday in any month that he shall be enabled to sell." That due notice of sale under said amended order was given and that sale was regularly made in compliance with law on June 6, 1899, at which sale J. J. Mundy was the highest bidder.

That on July 5, 1899, the administrator duly reported said sale, and on July 29, 1899, came on to be heard said report and said sale was duly confirmed by order reciting that: "The court heard evidence for and against said sale and inquired into the manner of sale, and being satisfied that the sale was fairly made and in conformity with law doth confirm the same and orders that the report be recorded and that the administrator execute conveyance to the purchaser on his compliance with terms of sale." That the administrator reported that he had cash instead of credit of one year and that the court ordered that his action in doing so be approved.

That on September 9, 1899, said administrator executed a deed to the premises in controversy to J. J. Mundy, which deed was regular in all respects and recites the orders above referred to, and that the administrator after due notice offered said premises for sale on the 6th day of June, 1899, and J. J. Mundy was the highest and best bidder, and the report of sale was made to the County Court and confirmed, and said Mundy had complied with the terms of sale, etc. The court also found as a fact that at the time Mundy purchased said property at administrator's sale he had no actual knowledge that the heirs had partitioned the land among themselves and knew nothing which would put him on inquiry and that said partition decree was not recorded until March 20, 1909.

As matters of law the trial judge concluded: 1st. That the partition decree between the heirs did not affect the right of the creditors of Leonora Flores to institute administration proceedings for the purpose of collecting their debts, because they were not parties to said partition and had no notice thereof. 2d. That the County

Court of El Paso County had jurisdiction of the administration of said estate; that all the proceedings had in that court were regular; that the deed from Stevens, administrator, and the confirmation order were regular, and that none of the proceedings can be collaterally attacked. 3d. That said administrator's deed vested title to the premises in controversy in defendant; and, 4th, that the partition decree bound only the parties to it, and as the administration proceedings bound the heirs and the creditors the defendant is entitled to recovery in this case.

Appellants' proposition under their first, second and third assignments is: "The District Court having partitioned the estate of Leonora Flores on February 25, 1894, and set apart the land in controversy to Annie Lockwood, the status of the property was thereby fixed and the County Court was without jurisdiction to appoint an administrator thereafter on July 23, 1896, and the attempted sale by Horace B. Stevens, so appointed, was void."

The above presents the pivotal question in the case. Although this was a collateral attack on the administration proceedings, lack of jurisdiction in the County Court to grant administration could be shown.

The statute authorizes administration on an estate at any time within four years. Creditors have the undoubted right within that period to the opening of an administration as a means, and the appropriate means, of collecting their debts. The proposition now under consideration asserts that this right is foreclosed from and after the time within the four years the District Court enters an order partitioning the property of the estate between the heirs, the heirs alone being the parties thereto. And in this connection appellant says that under this view the creditors lose no rights, that all the property is still subject to their claims, and their remedy is to follow the property in the hands of the heirs.

The proposition is an assertion of the power on the part of heirs to go into the District Court because of its general jurisdiction to partition property, at any time—we may say immediately after the intestate's death—and forestall and cut off the statutory remedy of administration, which the statute provides for creditors of the intestate. We could see reason in holding that creditors, who become parties to such a partition proceeding and have their claims adjudicated therein, would be cut off from the benefit of an administration. We can understand, also, how a creditor or creditors, although not parties to such a partition may in certain circumstances proceed against the heirs and subject the partitioned property in that way, waiving administration. But we find nothing that tends to support the idea that this agreed decree (and the same, we think, would apply if it had not been agreed) entered in behalf of the heirs alone, has any effect whatever upon the statutory right to take out administration upon the estate within four years from the intestate's death, or upon the jurisdiction of the County Court to grant administration. The partition judgment in question would no more have that effect than would be the case if the heirs had partitioned by executing deeds to each other. The proposition is accordingly overruled.

In Templeton v. Ferguson, 89 Texas, 47, it was stated that where the power of a Probate Court to grant an administration of an estate or to make an order of sale pending administration is denied on the ground that no necessity therefor existed, it may be considered a settled rule that if the record of the case in which such judgment was rendered does not negative the existence of the facts authorizing the court to make a particular order, the law conclusively presumes that such facts are established by the evidence before the court when such orders or judgments are rendered, and evidence of matters *dehors* the record to the contrary will not be received. See also Endel v. Norris, 93 Texas, 540.

Again, in Martin v. Robinson, 67 Texas, 368, the Supreme Court states that such a court must determine whether or not the facts exist which make it lawful for administration to be granted, and if in this respect, having power to make the inquiry, it comes to an erroneous conclusion, its decree founded on such conclusion is voidable but not void.

The conclusion, therefore, must be reached that unless the record of the Probate Court affirmatively shows that its jurisdiction to grant the administration did not in fact exist, or that the facts authorizing the sale that was ordered of this land did not exist, the sale to Mundy should be upheld.

It is contended by appellant that the claim docket was not the best evidence of the existence of debts, and that such testimony ought to have been excluded on objection. This is an immaterial matter in view of the fact that the order granting the administration and the orders appertaining to the sale, affirmed the existence of debts and a necessity of administration and of a sale of the property therefor. These findings are conclusive in this collateral proceeding, and it devolved upon appellants to show, and to show from the record in that proceeding, facts establishing the contrary.

Giving appellants the benefit of what was shown as to claims as they appear upon the docket, and otherwise in that proceeding, there is nothing which affirmatively shows that they were not claims for which the estate of Mrs. Flores was liable. If it appeared that they were community debts, and not such as the law rendered her separate property subject to, this might affect the validity of the proceedings. But this does not appear from the record. The appearance is to the contrary. One claim was in favor of Kelly & Pollard, $8.75, and Kelly & Pollard were shown to have been druggists. A claim of T. H. Swayne for $50, and another of A. L. Justice for $127.50, another of C. T. Race for $36, all being shown to be doctors. Another was in favor of Dolan's Star Stables, an undertaking concern, for $137.50. They may have been, and probably were, expenses appertaining to her last sickness and burial. At any rate, whatever they were for, the record is not contradictory of the determination that must have been made by the Probate Court, that they were her debts, or debts chargeable to her estate, which the action of that court necessarily involves. We do not and need not notice another claim, that of Juan Armendariz, which as it appears in the state-

ment of facts bears the allowance of the administrator, but not the approval of the county judge and does not appear on the claim docket.

The heirs of Mrs. Flores were charged with notice of the application for letters, the required notices having been given. They were authorized to appeal from the order granting same, or any other order made on the estate, and have the adjudication of the County Court reversed. This not having been done, the conclusive presumption exists, in the present proceeding, that the court acted upon proper and ample evidence.

What has been said sufficiently disposes of the fourth and fifth assignments.

As to the sixth assignment, we overrule it because the court's conclusion of fact in finding No. 2 was not incorrect in finding that Leonora Flores was at the time of her death indebted to at least six different parties. The finding probably was intended to include Armendariz, but his inclusion was not material. The record of the Probate Court in the estate not only warranted but required the finding. As to the seventh assignment, the court was not in error in refusing to find as a fact "that the debts mentioned in my finding of fact No. 2 were the community debts of Manuel Flores and Leonora Flores." They may have been community debts and still chargeable against the latter's estate.

The eighth assignment is that the court erred in finding that Mundy purchased the property without actual notice that the heirs had partitioned the land among themselves, and that the partition decree was never recorded until March 20, 1909, for the reason that said decree was made by the Thirty-Fourth District Court on February 24, 1894, and ever since that date has actually been of record in the district clerk's office, which in itself was sufficient notice to Mundy, if he was entitled to any notice. This finding as to notice is in our judgment entirely immaterial, as Mundy obtained title with or without it.

The ninth, tenth, eleventh and twelfth assignments are overruled, they being in effect disposed of by what has been stated in this opinion.

The Probate Court having statutory authority to grant the administration, and there being no intrinsic evidence upon the record of the proceeding establishing that it was granted contrary to law, nor that the orders relating to this sale were so made, the judgment rendered by the District Court was the correct one. Affirmed.

ON MOTION FOR REHEARING.

In this motion the idea is developed that there being no administration pending, the District Court had jurisdiction over matters pertaining to the estate if there were no debts, and it had jurisdiction to determine whether or not the jurisdictional fact was true, as alleged in the petition for partition, that Mrs. Flores owed no debts at the time of her death, and that it must be presumed that it determined the existence of this fact upon sufficient evidence, and hence, that fact having been ascertained by a court having jurisdic-

tion to pass upon it, it could not be reopened by the County Court upon an application for letters.

In the first place, we deny that it was in the power of the heirs by any act or proceeding solely among themselves, to deprive interested third parties of the statutory right to have the estate administered upon. The partition decree doubtless was a valid adjudication as between the parties to it, and it would have been so declared as to all persons had no application for letters been made during the prescribed statutory period. The property was subject to administration in the interest of creditors during the four years. The estate's title to the property was not disturbed by the partition decree. The division of the property among the heirs by decree, amicable or otherwise, or by deeds, would not affect the property so far as its remaining subject to administration was concerned. What was done by these heirs in the form of a decree, was done in view of the law which provided for an administration for the purpose of paying creditors, and the property in their hands was subject to administration, as before. See, for discussion of the subject: Succession of Bray, 24 So., 601.

Believing that the decree is not entitled to the effect claimed for it, we overrule the motion.

Affirmed.

Writ of error refused.

MANUEL ROGERS ET AL. v. ROBERT DRISCOLL ET AL.

Decided March 2, 1910.

1.—Special Issues—Practice.

When a case is submitted to a jury on special issues, the generality of one of the questions constitutes no objection to the answer when more specific instruction was not asked.

2.—Same—Answers not Inconsistent.

To one question, whether or not the debtor transferred the property in controversy with intent to hinder and delay his creditors, the jury answered, "No;" to another question, whether or not the debtor used the cash, or substantially all of it, received from the sale of said property in the payment of preexisting debts, the jury answered in the affirmative. Held, the answers were not inconsistent even when taken to mean that he did not so apply all of the cash.

3.—Statute of Frauds—Right to Prefer Creditors.

An insolvent debtor has the legal right to pay certain of his creditors in full and leave others unpaid, and to sell property with such intent and purpose. But when he sells his property with the intent of applying only a part of the proceeds to the payment of certain debts and to use the balance for the purpose of extorting an unjust compromise from other creditors, the sale is in contravention of the statute of frauds. Evidence considered and held not to warrant a finding that a sale of property by an insolvent debtor was not made with intent on his part to hinder and delay his creditors.

4.—Same—Insolvent Debtor—Innocent Purchaser.

Evidence considered and held sufficient to support a finding that a fraudulent intent on the part of an insolvent debtor in the sale of his property was not known to or participated in by the purchaser, and the sale was therefore valid as against existing creditors.

5.—Charge—Failure to Submit Issue—Practice.

A failure by the court to submit an issue raised by the evidence is not reversible error in the absence of a request to submit the same.

6.—Same—Fraudulent Conveyance.

The issue being whether or not a sale of land by an insolvent debtor was fraudulent, the court submitted the following issue to the jury: "At the time of the transfer did D. (the purchaser) have knowledge of facts and circumstances sufficient to cause an honest man of ordinary prudence to make enquiry, etc.?" Held, the use of the word "honest" in that connection was not error.

7.—Injunction—Refusal to Dissolve.

There can be no merit in an assignment of error that the trial court erred in refusing to sustain a motion to dissolve an injunction, when on final hearing the injunction is properly perpetuated.

8.—Same—Legal Remedy—Rule.

The rule that equity will not interpose when the party applying for an injunction has an adequate remedy at law, is not one which absolutely denies jurisdiction to a court of equity. It is rather a rule of convenience and propriety which the defendant or the court may avail itself of and which the defendant may waive. Therefore when this objection to an injunction is presented for the first time in an amended answer on the eve of trial, it was not error for the court to overrule the same.

9.—Attorney and Client—Notice to Attorney.

When the employment of an attorney is simply to prepare the deed and examine the title to a tract of land for a prospective purchaser, knowledge that the attorney may have acquired prior to and independently of that employment as to the fraudulent intent of the vendor of the land, can not be imputed to the client.

10.—Jury Trial—Province of Jury.

Where the evidence is conflicting, a jury has the right to reject the testimony of one of the parties and accept exclusively the testimony of another.

Appeal from the District Court of Duval County, Texas. Tried below before Hon. W. B. Hopkins.

Denman, Franklin & McGown, for appellants.—As the undisputed evidence in the case showed that Parr whilst insolvent had conveyed all of his property to Robert Driscoll with the intent to hinder and delay his creditors, and that the legal effect of the transfer of his property was to delay and hinder his creditors, and that of all this Driscoll had knowledge or notice when he purchased and, notwithstanding, paid Parr part of the consideration in cash, without seeing to the application of the cash to the payment of any of the creditors of Parr, the conveyance to Driscoll was void as to Parr's creditors, and the verdict of the jury is without any evidence to support it and contrary to the undisputed evidence in the case. Jacobs-Bernheim & Co. v. Totty, 76 Texas, 349; Blum v. McBride, 69 Texas, 63; Elser v. Graber, 69 Texas, 223 to 226; Oppenheimer v. Halff, 68 Texas, 409; Seligson v. Brown, 61 Texas, 180; Traylor v. Townsend, 61 Texas, 147; Houston & T. C. R. Co. v. Shirley, 89 Texas, 98; Miller v. Jannett, 63 Texas, 82; Blum v. Simpson, 71 Texas, 528, id., 66 Texas, 84; Proetzel v. Buck Stove Co., 26 S. W., 1110; Sweeney v. Conley, 71 Texas, 546.

That the transaction being fraudulent, the payment of the debt to Mrs. Collins gives no right to Driscoll, see: Lambeth v. McClinton, 65 Texas, 108; Elser v. Graber, 69 Texas, 223 to 226; Cox v. Miller, 54 Texas, 27; Mansur & Tebbetts Co. v. Jones, 45 S. W., 41; Greig & Jones v. Rice, 44 S. E., 729; Milwaukee & Minn. Ry. Co. v. Souter, 80 U. S., 543; Kohl v. Sullivan, 21 Atl., 247.

See also as to what constitutes notice: Mills v. Howeth, 19 Texas, 259; LeGierse v. Whitehurst, 66 Texas, 246; Dodd v. Gaines, 82 Texas, 429.

And as to where duty to inquire arises and effect of failure to exercise: Kansas M. P. Co. v. Sherman, 32 L. R. A., 3; Walker v. Collins, 50 Fed., 742; Brittain v. Crowther, 54 Fed., 298; Smith v. Collins, 10 So., 339.

See also as to facts putting purchaser on notice: Crawford v. Kirksey, 28 Am. Rep., 709; Carter v. Coleman, 2 So., 354; Dyer v. Taylor, 7 S. W., 258; Green v. Tantum, 19 N. J. Eq., 110; Ewing v. Teague, 29 S. W., 401.

That McGown, receiver, was creditor entitled to protection of statute, although claim not reduced to judgment at time of conveyance: Tucker v. Pennington, 45 S. W., 313; Frees & Sons v. Baker, 81 Texas, 221.

The petition showed no grounds for interference by a court of equity in the sale of the property involved in this suit under the execution against Parr on the judgment held against him by McGown, receiver. If the property involved belonged to Driscoll and not to Parr, a sale under the execution would not have passed Driscoll's title nor clouded same, and his remedy at law was adequate. Carlin v. Hudson, 12 Texas, 202; Whitman v. Willis, 51 Texas, 421; Kennard v. Mabry, 78 Texas, 158; Mann v. Wallis, 75 Texas, 613; Purinton v. Davis, 66 Texas, 455.

G. R. Scott & Pope and *R. L. Ball,* for appellees.—If an insolvent seller of property applies the money received by him for said property (or substantially all of it) to the payment of his debts, the purchaser is relieved of any and all legal obligation of seeing that said money is applied to the payment of the seller's debts. Ellis v. Valentine, 65 Texas, 532, 547; Sanger Bros. v. Colbert, 84 Texas, 668, 673; Haas v. Kraus, 86 Texas, 687, 689; Meyer Drug Co. v. Durham, 35 Texas Civ. App., 71.

An insolvent debtor may prefer one or more of his creditors, and may by any suitable means appropriate his property to the payment or part payment of the just claims of one or more of his creditors to the exclusion of the others. Ellis v. Valentine, 65 Texas, 532, 544; Smith & Co. v. Whitfield, 67 Texas, 125; Elser v. Graber, 69 Texas, 222, 225; Frees & Son v. Baker, 81 Texas, 216, 220; Wood v. Castleburg, 34 S. W., 653; Head v. Bracht, 40 S. W., 630.

It is within the discretion of the court whether a case shall be submitted to the jury on special issues. Rev. Stats., art. 1331; Texas & P. Ry. Co. v. Miller, 79 Texas, 78, 84; Galveston, H. & S. A.

Ry. Co. v. Jackson, 92 Texas, 638; Woodmen of the World v. Locklin, 28 Texas Civ. App., 486.

The reasonable market value of property alleged to have been fraudulently transferred in connection with the price paid, was and is a proper issue in determining the good or bad faith of Archie Parr in the transaction, and in determining whether the transaction had the element of insufficient purchase price, pointing to an intent on the part of Parr to defraud, and a consequent notice or suggestion of such intent to the purchaser, Driscoll. Ellis v. Valentine, 65 Texas, 532, 548; Sanger Bros. v. Colbert, 84 Texas, 668, 673; Bruce v. Koch, 94 Texas, 192, 194; Myer Bros. Drug Co. v. Durham, 35 Texas Civ. App., 71.

Knowledge on the part of the vendee of property of the insolvency of the vendor, is not sufficient to taint the transaction with fraud as to the vendee; but there must be the further knowledge on the part of the vendee of a fraudulent intent on the part of the vendor. And an issue having been joined as to the knowledge of Driscoll of Parr's intent, it was proper and became the duty of the court to submit said question No. 5 to the jury. Dittman v. Weiss, 31 S. W., 67, 70; Sanger Bros. v. Colbert, 84 Texas, 668, 672; LePage v. Slade, 79 Texas, 473, 477; Meyer Bros. v. Durham, 35 Texas Civ. App., 71; Texas Drug Co. v. Shields, 20 Texas Civ. App., 274; Armstrong Co. v. Elbert, 14 Texas Civ. App., 141; Kopperl v. Standard Distilling Co., 119 S. W., 1169; Edwards v. Anderson, 31 Texas Civ. App., 131.

JAMES, CHIEF JUSTICE.—Floyd McGown, as receiver for J. M. Chittim, having levied an execution on the land in controversy, Robert Driscoll filed a petition for injunction, restraining the enforcement of the writ, against Rogers, sheriff of Duval County, and said receiver.

Driscoll's petition averred that he was owner of the land, etc. Pending the injunction suit Driscoll sold the land to C. M. Robinson, who was made a party defendant.

Defendants, the sheriff and McGown, receiver, set up that the transfer of the land from Parr to Driscoll was made with intent to delay and hinder the creditors of Parr; that Driscoll purchased with knowledge of such intent, and that Robinson, in turn, purchased pending the suit with knowledge of such intent, and prayed that the injunction be dissolved and the land sold and the proceeds thereof applied to the payment of the receiver's judgment against Parr.

The court submitted the case upon special issues, and, upon the findings, judgment was entered for appellees.

Under the fourteenth and second and third assignments of error appellants frame and brief the following propositions:

"As the undisputed evidence in the case showed that Parr whilst insolvent had conveyed all of his property to Robert Driscoll with the intent to hinder and delay his creditors, and that the legal effect of the transfer of his property was to delay and hinder his creditors, and that of all this Driscoll had knowledge or notice when he purchased, and notwithstanding paid Parr part of the consideration in cash without seeing to the application of the cash to the payment of any of the creditors of Parr, the conveyance to Driscoll was void

as to Parr's creditors, and the verdict of the jury is without any evidence to support it and contrary to the undisputed evidence in the case."

"As the undisputed evidence shows that the transfer from Parr to Driscoll was made to hinder and delay his creditors in the collection of their debts, and that the creditors were actually hindered and delayed in such collection by said transfer, and that said Robert Driscoll had knowledge or notice of the purpose of said transfer or the necessary legal effect thereof, and did not see to the application of the cash paid by him to the payment of Parr's debts, it was error in the court to submit to the jury for decision such undisputed facts, and that the court should have charged the jury that said facts were shown by the evidence. The submission of the facts for determination by the jury was in effect an expression by the court that the facts were disputed, and the submission, which was in the nature of a charge to the jury, was, therefore, on the weight of the evidence."

These propositions require consideration of the evidence.

The first material issue in the case is whether or not Parr made this sale to Driscoll with intent to delay or hinder his creditors. The court submitted this issue and the finding was in the negative. If there was evidence supporting this finding, it seems to us that it put an end to the case, and the other submissions were of matters of no significance, unless the findings thereon happened to be contradictory of the above, which they were not.

The third question submitted was: "Was the transfer by Archie Parr to plaintiff Driscoll of the land in controversy herein made with intent on the part of said Parr to delay or hinder creditors?" The answer was, "No." The generality of this question constitutes no objection to the finding where a no more specific instruction was requested.

The finding in answer to the first question, that Parr used the cash payment of $5000 made him by Driscoll, or substantially all of it, in the payment of preexisting debts of said Parr, was not a finding inconsistent with the answer to question 3, even when taken to mean that he did not so apply all of the cash.

The finding in answer to question 2, which was that the price at which the land in controversy was sold to Driscoll was the reasonable fair market value of the same at the time, was consistent with it; and the findings in answer to questions 4, 5 and 6, which were in substance that Driscoll did not have actual knowledge of an intent on the part of Parr to delay or hinder creditors, if any, nor knowledge of facts and circumstances sufficient to put him on notice of such intent, were rendered wholly unimportant by the answer to question 3, because it is evident that if no such intent of Parr existed, it would follow of necessity that Driscoll did not know of it, nor was put upon notice of it.

Therefore, we shall examine the condition of the evidence as to its supporting the finding under question 3, and the conclusion we reach is that the finding was contrary to the evidence. Parr owned this land and some stock upon it which he sold to Driscoll on November 14, 1905, in consideration of the latter's assumption of a

mortgage thereon to Mrs. Collins amounting to $20,430 principal and $6,129 interest, and of $5000 cash. On November 17, 1905, Parr conveyed to Edds & Thompson all his cattle excepting one cow, calf and heifer known as his milk cow in the town of San Diego, from which sale he, Parr, satisfied a mortgage debt on them due to Driscoll of $10,000, and received about fifty-five hundred dollars in cash from Edds & Thompson. It appears clearly from both Parr and Driscoll's testimony that the latter knew this cattle sale had been agreed on at the time Driscoll bought the land in question, although the transfer to Edds & Thompson was of date three days later. By the above conveyances he disposed of practically all the property he owned.

The evidence shows that he received the $5000 from Driscoll and applied the larger part of it, though not all, to the payment of certain then existing creditors, keeping the money in his personal possession and making such application of it from time to time during the next several months as he saw fit, but using some of it for other purposes. He was at the time of the sale to Driscoll in failing circumstances, in fact insolvent. He had creditors in the section where he lived, owing them about $6000. Besides this, he owed J. M. Chittim on their mutual partnership affairs and there was a suit pending against him in Bexar County brought by Chittim's receiver, which in course of time resulted in a judgment against him for about $60,000, being the judgment upon which the execution in question was levied.

There is testimony that shortly before the deal with Driscoll he formed the idea of selling his property for the purpose of paying his mortgage debts and to obtain cash to use in settling debts.

Parr testified: "When I went to see Judge Welch before going to see Mr. Driscoll I said, 'Judge, these people up here are lawing me and I have no papers and no books or anything and they are liable to get a judgment against me and if they do they will sell my property and take everything I have got away from me, and I owe my neighbors around here who have been crediting me for years,' and I told him that I owed debts running anywhere from $10 to $2000, and he told me, 'Go and sell your property, and after you have sold it, pay all your debts and if you have anything left, offer it to these people to settle the business with them.' Told me to go and sell my property and go and pay my debts, and then go and offer the balance to these people on this Chittim indebtedness. . . . I proposed at that time that my home people should be paid first. . . . It is exactly true that I converted all of my property into cash and that I had the cash in my possession and that it was dependent upon my purpose as to whether these creditors got their money or not." Again Parr testified: "Before going to see Driscoll I went to see Judge Stanley Welch. I didn't tell Judge Welch that my creditors were about to hop on me and that I wanted to do something with my property, because I did not have any creditors that were about to hop on me. I made the sale of the property because I was afraid that my friend Mr. McGown would get a judgment against me and take all that I had and leave these people around

here without anything. I did not make the sale exactly for the purpose of keeping Mr. McGown from collecting that judgment. I made the sale to pay my honest debts around here."

The result of his interview with Judge Welch was that he went to see Driscoll at the latter's ranch. He testified: "I went to Mr. Driscoll's ranch and I says, 'Mr. Driscoll, I owe a lot of debts around here and I would like to pay them, I says. I have sold my cattle and I have got a mortgage on the place to Mrs. Collins and the interest will be due some time next year, and as I have no means of paying the interest I would like to sell the property, and I says I want to pay up all my debts and square up.' 'Well,' he says, 'What will you take for it?' I said, 'You pay the mortgage off and give me $5000 cash and I will sell it to you.' He asked how much the mortgage was. 'I says, I think about $20,400,' He says, 'How long does the mortgage run?' and I says, 'I put it on for five years.' He says, 'I can take the mortgage up at any time I want to?' and I says, 'Yes, if you will wait until the year expires;' that it was fixed so that it could be taken up at any time at the end of the year, but if he did not wait until the end of the year, he would have to pay interest for the year anyhow. He says, 'What rate of interest?' I says, 'Six percent.' He says, 'Well, all right; you tell Judge Welch to look after the papers and examine, and if everything is all right, for him to make out the deed, you have it recorded, and then bring it to me and I will give you the money;' and I then went to Judge Welch and told him what Mr. Driscoll had said and Judge Welch fixed up the papers and gave me the deed. I then had it recorded and took it to Mr. Driscoll and he gave me the money."

We may add, as a result of the testimony of both Parr and Driscoll, that the above was substantially the transaction as it occurred.

Upon the testimony given by Parr we meet difficulty in sustaining the finding of the jury in answer to question No. 3. Had there been the single transaction of the sale to Driscoll we would be able to say, without hesitation, that there was evidence that he had at the time the intent of getting the $5000 cash from Driscoll for the purpose of applying the same to prefer and pay his local debts, which according to all the testimony amounted to more than that sum. Such purpose would be a legitimate one, and not fraudulent, in the sense of the statute, although thereby other creditors were intentionally delayed, hindered or even defeated. That an insolvent debtor has the legal right to pay certain of his creditors in full and leave others unpaid, and the legal right to sell property with such intent and purpose, is too well settled to require discussion. And if the finding No. 3 could be sustained upon the evidence, it would end the case, because it is clear that if the sale was not made with intent to defraud, delay or hinder creditors in the meaning of the statute, there would be nothing to affect the title of the purchaser.

But Parr's testimony shows that when he made the sale to Driscoll, he was also in the act of selling his cattle to Edds & Thompson, and was in the act of getting from such sale an additional sum of cash amounting to between five and six thousand dollars. His intent, as it appears from his own testimony, was to dispose of all his prop-

erty for enough to pay his local creditors and leave him four thousand dollars surplus, which he did not intend to pay over unconditionally to McGown. In this connection he states that it did not take the whole of the ten thousand dollars to "pay off my creditors" (meaning his local creditors). "It took about six thousand dollars to pay off my creditors, and I offered Mr. McGown the other four thousand dollars. I offered him four thousand dollars to pay a fifty-one thousand dollar indebtedness." . . . "If a man owes me a ten thousand dollar debt and offered me fifty cents to settle the debt, why I would take it in settlement if I knew I was not going to get any more. I know that Mr. McGown is not going to get any more. I am going to beat him just as long as I am here, that is what I am here for, and if I don't beat him in this suit I am going to take the bankruptcy law. When I made the sale to Driscoll I intended to pay all my creditors off that I owed and then give the balance to Mr. McGown if he would settle the judgment."

It is, therefore, clear from his testimony that at the time of the disposition of all his property, inclusive of the sale to Driscoll, his purpose was to hinder, delay and, to a large extent, defeat the creditor McGown. The finding No. 3 not being sustainable, the question is squarely before us whether the other findings upon which the judgment may rest, were supported by the testimony.

Driscoll testified that on November 14, 1905, he knew nothing about Parr's financial condition and made no inquiries as to it. That Parr was indebted to him at the time for $10,000 secured by a chattel mortgage on his cattle. That he had the land in controversy, but he knew nothing about his other property. That he had heard of the Chittim suit against Parr in Bexar County. "I didn't know at the time I bought that property from Parr that he was indebted to Chittim. I knew that they were to have a settlement of some kind, but I didn't know which was indebted to the other. . . . I did know there was a difference on account between them, but I didn't know how it stood. I didn't know the amount that Chittim was at that time claiming that Parr owed him, and Parr at that time never said that he was indebted to Chittim. . . . I didn't make any inquiry of Chittim as to the extent of his claim against Parr. . . . When I bought from Parr, I didn't make any inquiry from him as to what property he owned besides what he was selling to me and never made any inquiry about it. . . . I bought Parr's land. He came down and wanted to sell his land. He said he was in debt and wanted to get out of debt and sell his land. . . . Parr told me he wanted the money for the purpose of paying some of his debts. He said he was indebted in a considerable amount. . . . He wanted about five or six thousand dollars in money—that he owed some debts that he wanted to pay. I never asked him what they were, or how much he owed, or did not owe. . . . I got Judge Welch to examine the title and make an examination of the records and see if the records were clear. . . . I had advice from Judge Welch that the title was clear before I paid the money subject to the Collins mortgage, and I paid that, that was recited in the deed. . . . I knew nothing outside of what he told me. . . .

If I had inquired of Mr. Parr as to whether he had other property, I knew him well enough to know that he would have told me—the money I paid him was enough to cover everything he told me. If I had asked him the question, I could have found out whether he had any other property. I didn't do that. I never asked Mr. Parr for a list of his indebtedness and he never told me who his creditors were; he told me about the mortgage and that he owed five or six thousand dollars on the outside."

There is no evidence that Driscoll knew of the aforesaid intent on the part of Parr to reduce his property to money for the purpose of paying off his local creditors with part of it and to withhold the remainder from McGown, or to use it to dictate terms of settlement to McGown. The jury had the right to believe both Driscoll and Parr, or what either of them testified to, and that from their testimony the latter did not make known or refer to anything that suggested to the former that he had such a purpose in view. The jury may have attached weight to Driscoll's statement: "I knew him (Parr) well enough to know that he would have told me," etc., as showing Driscoll's confidence in Parr's truthfulness, so that when Parr told him he wanted the money to pay all his debts and square up, he, Driscoll, had just reason to believe, without further inquiry, that that was Parr's real purpose. The rights and duties of Driscoll must be looked at from his standpoint, and if the jury believed, as they may have done, that if he had confidence in the statements of Parr, as he seemed to have, he was not, in the exercise of due care and good faith, required to take notice of a contrary purpose. It was consistent with Driscoll's testimony that he did not know that Parr was insolvent.

The testimony was sufficient, in our opinion, to sustain the answer to the 4th question, which was, that at the time of the transfer to Driscoll, he did not have actual knowledge of the intent of Parr to thereby delay or hinder his creditors.

Also sufficient to sustain the answer to the 5th question, in effect that Driscoll did not have knowledge of facts and circumstances sufficient to cause an honest man of ordinary prudence to make inquiry as to whether or not the transfer was made with such intent on the part of Parr.

The finding of the jury in answer to question 2, was that the price at which the land was sold to Driscoll was its reasonable, fair market value, at the time. The evidence amply supports this finding.

These findings authorized the judgment rendered.

Enough has been said to make it proper to overrule the assignments of error from four to nine, likewise numbers eleven and thirteen and one-half, and also the propositions under the fifteenth and twelfth.

The sixteenth assignment complains of the giving of the said six special charges, and omitting to submit a question as to whether the conveyance from Parr to Driscoll was made upon a secret trust in each instance being for the benefit of Parr. Appellants set forth the evidence which they claim raises such issue, but no request appears to have been made to submit it.

Complaint is made by a proposition under the eighth assignment,

that the fifth question was erroneously worded. It read: "At the time of said transfer . . . did Driscoll have knowledge of facts and circumstances sufficient to cause an honest man of ordinary prudence to make inquiry as to whether or not said transfer was made with intent on the part of Parr to delay or hinder his creditors?" The word "honest," in that connection, is claimed to be error. We think not. See Dodd v. Gaines, 82 Texas, 429, for an expression of the rule in accordance with the wording of this instruction.

The tenth assignment is overruled. If the jury had found affirmatively, all the facts recited in the special question marked A, asked by appellant, it would have made no difference in the result, in view of the findings which we consider anthorized the judgment rendered.

The first assignment is that the court erred in overruling the motion of appellants to dissolve the temporary injunction. In view of the fact that the final judgment sought to be reviewed by this appeal perpetuates the injunction, we see no force in this assignment.

We overrule the seventeenth assignment which complains of the overruling of the motion for new trial.

The thirteenth assignment alleges that the court erred in overruling the general demurrer to plaintiff's petition. The demurrer was generally to the petition as showing no cause of action and no right to an injunction. The proposition is that the petition shows no grounds for interference by a court of equity in the sale of the property under the execution against Parr, because, if the property belonged to Driscoll, and not to Parr, a sale under the execution could not have passed Driscoll's title nor clouded same, and his remedy at law was adequate. The principle invoked is that declared in a number of cases, and fully explained in Mann v. Wallis, 75 Texas 613. The matter was raised by appellant too late to entitle him to insist on the application of the rule. His suit was instituted on April 2, 1906. The original answer is not in the record, and the first amended original answer filed May 26, 1909, contained this demurrer, and so far as we know, this was the first time the demurrer was pleaded. This amended pleading purports to amend defendant's original answer, "filed on the 30th day of April, 1908." The court overruled the demurrer on the day it was filed, May 26, 1909, as the case was going to trial.

The rule that equity will not interpose where the party applying has an adequate remedy at law, is not one which absolutely denies jurisdiction to the court of equity. It is a rule, we think, of convenience and propriety which the defendant or the court may avail itself of. It is certainly one which the defendant may waive, and we think the court was not in error in overruling this demurrer when, as it appears, it was not interposed until long after defendants had answered, and not until after the suit had been allowed to pend for three years, and when the case had been prepared for trial and about to proceed to trial. Rivers v. Campbell, 51 Texas Civ. App., 103 (111 S. W. 190). As the court did not see fit to decline to hear and determine the controversy, it was the privilege of defendants to invoke said rule or not, and a right of this kind must be seasonably asserted. It was not so asserted in this instance.

Before concluding, there is a contention made by appellants in the

argument which should receive attention. It is that Driscoll was charged with knowledge possessed by Judge Welch, his agent in consummating the purchase of this property, and that Welch knew Parr's intent. The testimony is ample to show that all Driscoll referred this matter to Welch for, was for him to pass upon the record title, and to draw the papers, and this, after Driscoll had made the trade with Parr. Under these circumstances, Driscoll could not be charged with any knowledge that Welch had acquired prior to and independently of that employment. The judgment is affirmed.

ON MOTION FOR REHEARING.

It is insisted by this motion, among other things, that the record shows enough undisputably, to have put Driscoll upon inquiry as to Parr's actual condition. We think, that if Driscoll's statements be accepted as true, it can not be declared, as a matter of law, that he was informed of facts which would have prompted an ordinarily prudent person to take a different course than that which he pursued. It was, in our opinion, a question for the jury, and they had the right to act upon Driscoll's testimony, exclusively, if they saw proper.

Nor was the relation between Driscoll and Welch, as shown by the evidence, conclusively such as would make the latter's knowledge the knowledge of Driscoll.

It is also insisted that when this court determined that the finding of the jury in answer to question 3, that Parr had not transferred his property to hinder and delay his creditors, was against the evidence, the cause should have been remanded, notwithstanding the further finding of the jury in answer to the fifth question that Driscoll did not have knowledge of facts and circumstances sufficient to cause an honest man of ordinary prudence to make inquiry as to whether or not said transfer was made with intent on the part of Parr to delay or hinder his creditors. Appellant says that the jury having found that there was no such intent on the part of Parr, they could not have answered the fifth question affirmatively.

The question No. 5 was propounded without any connection with No. 3 and as an independent issue. It was an independent question in fact, one affecting Driscoll's conduct, and one which Driscoll had a right to have submitted and determined as it involved a complete defense for him regardless of any other issue. In reality the question called for a finding from the evidence relative to the facts and circumstances known to Driscoll at the time, as to whether or not it was sufficient, in any event, to put an honest man of ordinary prudence upon inquiry into Parr's intent. The jury should be presumed to have possessed sufficient intelligence to understand that their answer was to be made without regard to what their finding was as to Parr's conduct. The finding is not inconsistent with any other finding. The answer determined the question. Motion overruled.

Affirmed.

Writ of error refused.

WESTERN UNION TELEGRAPH COMPANY v. J. P. ROBERTSON ET AL.

Decided March 2, 1910.

1.—Telegram—Notice of Damage—Error in Transmission.

The following message was delivered to a telegraph company for transmission: "Can get option for one twenty-five per acre for forty days putting up five hundred dollars. What must I do? Answer immediately." As delivered to sendee it read: "Can get option for seventy-five per acre," etc. To this message the sendee replied instructing the sender to close the contract. Held, the message as delivered to the telegraph company was sufficient to charge them with notice that it related to a business transaction which involved putting up $500 which might be lost by error in its transmission, and hence it could not be said that such consequence was not within the reasonable contemplation of the parties at the time the message was accepted for transmission. The fact that the parties bought the land outright instead of taking an option, was not a matter which could avail the defendants.

2.—Same—Contract for Repeating—Limiting Liability.

While a telegraph company may limit its liability for an unrepeated message, the limitation can not be extended so as to relieve it from the consequences of its negligence.

3.—Variance—Objection to Evidence—Practice.

Objection to evidence on the ground of variance should be made when the evidence is offered; the question of variance can not be raised by an instruction to the jury.

4.—Telegram—Mistake in Transmission—Imputed Knowledge.

When a telegram is sent by one partner to another and in the transmission a mistake is made which results in injury to the partnership, the knowledge of the sending partner as to the correct reading of the telegram can not be imputed to the receiving partner or the partnership.

Appeal from County Court of El Paso County. Tried below before Hon. Albert S. Eylar.

George H. Fearons and *Beall & Kemp,* for appellant.—The suit was based upon a telegram sent by Robertson to his associates that he could get an option for one twenty-five per acre for forty days, putting up five hundred dollars; and it was not within the reasonable contemplation of the parties to the contract that an option could be purchased for a less sum, thereby causing damage to the plaintiffs, and therefore appellant's exception should have been sustained. McAllen v. Western U. Tel. Co., 70 Texas, 243; Western U. Tel. Co. v. Hall, 124 U. S., 444; Western U. Tel. Co. v. Fellner, 58 Ark., 29; Hibbard v. Western U. Tel. Co., 33 Wis., 558; Squire v. Western U. Tel. Co., 98 Mass., 232; Stansell v. Western U. Tel. Co., 107 Fed., 668.

The court erred in paragraph five of its charge to the jury. Western U. Tel. Co. v. Hearne, 77 Texas, 83; Womack v. Western U. Tel. Co., 58 Texas, 176; Western U. Tel. Co. v. Edsall, 63 Texas, 668.

The charge was erroneous in this: that the telegram sued upon informed the defendant company in express terms that Robertson, the sender of said telegram, could get an option of $1.25 per acre for forty days, and that by the answer of Connell & Jowell, to whom it was addressed, the said Robertson was authorized to close the trade,

while the undisputed evidence shows that Robertson did not get an option on said land at all for forty days, but purchased the land, making a cash payment thereon of $500, with the balance payable in installments, and the said charge was not supported by the pleadings or evidence. Dolores Land & Cattle Co. v. Jones, 3 Texas App. Civ., 329; St. Louis, I. M. & S. Ry. Co. v. Edwards, 3 Texas App. Civ., 410; Moore v. Kennedy, 81 Texas, 144; Riverside Lumber Co. v. Lee, 7 Texas Civ. App., 522.

Said charge was erroneous because defendants had no notice of the purchase of said land and could not be affected by the terms of said sale, nor be liable for the special damages arising from the breach thereof. Western U. Tel. Co. v. Lively, 15 S. W., 197; Primrose v. Western U. Tel. Co., 154 U. S., 1; Hadley v. Baxendale, 9 Exch. (Eng.), 341; Western U. Tel. Co. v. Watson, 94 Ga., 202.

The court erred in refusing defendant's first special charge to the jury wherein they were instructed "to return a verdict in favor of the defendant, because the undisputed evidence shows that the suit was based upon a telegram which evidences a contract to be made for the purchase of an option on land for $1.25 per acre, while the written contract offered in evidence by the plaintiff evidences a contract made for the purchase of the land, and there is a fatal variance between the contract sued upon and the contract proved to have been made by the plaintiff, the terms and conditions of which were not made known to the defendant company." Dolores Land & Cattle Co. v. Jones, 3 Texas App. Civ., 329; Riverside Lumber Co. v. Lee, 7 Texas Civ. App., 522.

Leigh Clark, Harris Walthall and *Nagle & Scott,* for appellees.

NEILL, ASSOCIATE JUSTICE.—This suit was brought by the appellees, J. P. Robertson, W. D. Connell and Spencer Jowell, as partners, against the Western Union Telegraph Company, to recover damages incurred by reason of the negligence of the company in failing to correctly transmit this telegram:

"April 23, 1907.

"Connell & Jowell, Midland, Tex.

"Can get option for one twenty-five per acre for forty days, putting up five hundred dollars. What must I do? Answer immediately. "J. P. Robertson."

The plaintiffs' petition alleges that on the day the message was delivered to the company for transmission the plaintiffs were acting together in purchasing and acquiring certain lands in the Republic of Mexico, known as the Von Roeder lands, in the District of Galeana, State of Chihuahua, which comprise an area of about 43,380 acres; that plaintiffs were desirous of purchasing and acquiring said lands and of disposing of them to other parties at a profit, and that Connell and Jowell were then negotiating with parties at Midland, Texas, and elsewhere, for the resale of said lands.

That on said day one of plaintiffs, J. P. Robertson, acting for himself and his coplaintiffs, procured from L. E. Booker, the owner, or

agent of the owner, of said lands, a proposition for the sale of the lands, which was substantially as follows: That said land would be sold to plaintiffs for the sum of $1.25 per acre, $500 to be paid in cash to Booker on acceptance of the offer by plaintiffs as a part of the purchase price of the lands, and the balance of the purchase price to be paid at times agreed upon under the terms of sale.

That Robertson, desiring to advise his coplaintiffs of the proposition and procure their approval or disapproval of it, delivered in El Paso, Texas, to defendant, the telegram above recited to be transmitted and delivered to them at Midland, Texas, meaning and intending thereby to inform them that the land could be obtained, or an option thereon for forty days, at the price of $1.25 per acre, by putting up $500, and that its meaning would have been so understood by Connell & Jowell.

That said message was on the day of its date received by defendant at El Paso, Texas, for transmission over its wires to Midland, Texas, and to be delivered there to Connell & Jowell, the defendant having been paid by plaintiffs the sum of fifty cents, the usual charge, for its transmission and delivery; that defendant negligently failed to transmit and deliver the telegram at it was written, but carelessly changed its wording, and delivered, instead, to Connell & Jowell the following message:

"El Paso, Texas, 4/23/1907.

"To Connell & Jowell, Midland, Texas.

"Can get option for seventy-five per acre for forty days, putting up five hundred dollars. What must I do? Answer immediately.

"J. P. Robertson."

That the message, as so delivered, caused Connell & Jowell to believe that their associate, Robertson, was procuring the land at seventy-five cents per acre, and, acting under such belief, they wired him to close the contract as per his wire; that acting under such advice of Connell & Jowell, J. P. Robertson, acting for himself and his coplaintiffs, then contracted with the owner of the land for the purchase of the land upon the terms above stated, and on April 24, 1907, he paid Booker for himself and his coplaintiffs the sum of $500 cash to be applied on the purchase price of the lands on the terms stated, and contracted and agreed to pay the balance of the purchase money at times and on terms agreed upon with Booker; and that when Connell & Jowell directed Robertson to close the deal for said lands they were not advised of the fact that the purchase price was $1.25 per acre, and were not so advised until several days afterwards.

That if the telegram had been correctly transmitted without change or omission Connell & Jowell would not have advised nor authorized Robertson to close the contract of purchase at $1.25 per acre, nor would such contract have been made, nor the $500 paid thereon or any part thereof.

The petition then alleges that after Connell & Jowell sent their telegram to Robertson authorizing him to close the trade, and before they were aware of the change in the wording of the original message,

Connell, at an expense to plaintiffs of $50, went to El Paso to see the land, and that thereafter he and Robertson, at an expense of $150, went from El Paso to classify and ascertain its value, etc.; that such expenditures might have been reasonably contemplated by defendant.

The petition closes with a prayer for $500, for the fifty cents paid for sending the message, and for the expenses incurred as alleged above.

The defendant interposed a general demurrer to plaintiffs' petition, and specially excepted thereto upon the ground that the $500 paid out and the expenses incurred by plaintiffs in going to El Paso and in inspecting the lands, were too remote to constitute a basis for damages. It then answered by a general denial, and plea of contributory negligence, and pleaded specially that, according to the terms of the contract, it was not liable for mistakes or delays in the transmission or delivery of the message beyond the amount received in sending the same.

The general demurrer was overruled, the special exceptions were sustained in so far as they pertained to the expenses alleged to have been incurred by plaintiffs in one of them going from Midland to El Paso and in viewing the land, but in so far as they related to the $500 paid on the land and the 50 cents paid for sending the message, such exceptions were overruled. The case was then tried by a jury, and the trial resulted in a verdict and judgment in favor of plaintiffs for $500.50, from which judgment this appeal is prosecuted.

Conclusions of fact.—The evidence is reasonably sufficient to warrant the jury in finding: (1) That the defendant received the message first copied in this opinion, and that, through its negligence, it was transmitted and delivered to Connell & Jowell as alleged by plaintiffs and as is herein set out. (2) That defendant received from plaintiff 50 cents for transmitting and delivering the message. (3) That the message, when delivered to defendant for transmission, was so worded as to put an ordinarily prudent person, engaged in the business of transmitting and delivering telegraphic messages for hire, upon notice that pecuniary loss might probably ensue to the sender or sendees, or both, if not transmitted and delivered as it was written when received. (4) That the mistake made in the telegram, through the negligence of the defendant, induced Connell & Jowell to authorize Robertson to enter into a contract with the owner or his agent to purchase the lands mentioned in plaintiffs' petition, and to pay out $500 in pursuance of such contract. (5) That a person of ordinary prudence, under the same or similar circumstances, would have paid out the money as was done by Robertson, and that he was not negligent in doing so. (6) That, as the direct and proximate cause of defendant's negligence, the $500 was lost to plaintiffs. (7) That the plaintiffs used ordinary diligence to avoid such loss as soon as they could reasonably anticipate that it might probably occur. (8) That by reason of defendant's negligence the plaintiffs have been damaged in the amount found by the jury.

Conclusions of law.—1. The first assignment of error complains of the court's overruling defendant's special exception to plaintiffs' peti-

tion, wherein the sum of $500 is claimed as damages, on the ground that such damages are too uncertain, speculative and remote, and not such as were within the reasonable contemplation of the parties. As is said in Western U. Tel Co. v. Houston Rice Mill Co., 93 S. W., 1085: "Our decisions, and those generally prevailing elsewhere, are to the effect that, while it is not essential that the company should have explicit information of the character of the telegram and the consequences involved in its failure to perform its duty, still it must be apprised in some way, either from the wording of the telegram or from information imparted to it by the sender, or from circumstances, that its failure to transmit or deliver it with dispatch will probably occasion some injury or loss. It is sufficient, however, if the message indicates or suggests that it has reference to a matter from which such a consequence may result from its nondelivery." Western U. Tel. Co. v. Turner, 94 Texas, 309; Texas & W. Tel. Co. v. Mackenzie, 36 Texas Civ. App., 178 (81 S. W., 582); Postal Tel. Co. v. Levy, 102 S. W., 134. It seems to us that the telegram upon its face clearly indicates that it has reference to a business matter from which some injury or loss will probably ensue if it is not transmitted and delivered as written by the sender. It disclosed the fact that Robertson wanted advice from his coplaintiffs as to what he should do in regard to a matter of business which involved putting up $500. And, as the evidence shows that he would not have received the advice he did if the message had been sent as written, nor have put up the money without such advice, the defendant should be held responsible for its loss, which the jury found was the direct result of defendant's negligence in not properly sending the message. As an option of the nature of the one indicated by the telegram has reference to a sale, and may culminate in a sale at any time after it is given, it was no affair of the defendant that a contract of sale, instead of an option for forty days, was entered into, for in either event the $500 had to be put up by the plaintiffs and would have been lost to them through defendant's negligence.

2. The second assignment of error complains of the fifth paragraph of the charge, which is as follows: "You are further instructed that if the mistake made in the transmission or delivery of the message from Robertson to Connell & Jowell on April 23, 1907, was caused or brought about on account of or by reason of negligence on the part of the defendant or its agent or servants, if it so was, then conditions and stipulations as to unrepeated messages pleaded by defendant can not avail it anything in this action."

The charge presents a correct principle of law applicable to the case. While a telegraph company may limit its liability for an unrepeated message, the limitation can not be extended so as to relieve it from the consequences of its negligence, for when the plaintiff has proved negligence on the part of the telegraph company in transmitting the telegram, and that damages were proximately caused by such negligence, such a stipulation in regard to repeating the message as was pleaded by defendant in this case amounts to nothing; or, in other words, the contract is as though it contained no such stipulation. Western U. Tel. Co. v. Linn, 87 Texas, 7; Western U. Tel. Co. v.

Norris, 25 Texas Civ. App., 43 (60 S. W., 982); Mitchell v. Western U. Tel. Co., 12 Texas Civ. App., 262 (33 S. W., 1016); Postal Tel. Co. v. Sunset Const. Co., 102 Texas, 148. We can perceive no force in the proposition "that the paragraph referred to is erroneous because it prevented the jury from considering the mistake in the transmission of the message in connection with and as bearing upon contributory negligence of the plaintiffs." The other proposition can not be evolved from and is not germane to the assignment, and will not be considered.

3. This part of the charge is complained of by the third assignment of error: "Now if you believe from a preponderance of the evidence that Robertson delivered the message first set out in this charge to the defendant and paid it the sum of fifty cents to transmit the same, and the defendant accepted the same and delivered it through its agents to the sendee so that it read 'twenty-five or seventy-five,' and did not read 'one twenty-five,' as it read when delivered to defendant; and if you further believe that said message as delivered to defendant by Robertson was so worded as to put an ordinary prudent person on notice that pecuniary loss would probably result if not delivered by it as it was when it received same; and if you further believe that such change or omission on the part of defendant, if any, was negligence, and proximately caused the damage complained of, and you further believe that said mistake in the telegram induced Connell & Jowell to authorize Robertson to enter into an option to purchase land, or to enter into a contract to buy land, and (in either event) put up five hundred dollars to carry out such purpose; and that an ordinary prudent person under the same or similar circumstances would have put up said five hundred dollars; and that as a result the five hundred dollars was put up and lost to plaintiffs; and that upon discovering said loss had occurred, or would probably occur, plaintiffs used such diligence to avoid said loss, if any, as had occurred or as might occur, as would have been used by men of ordinary prudence under the same or similar circumstances, then you will render your verdict for plaintiffs for the sum of five hundred dollars, with interest thereon from April 29, 1907, at six percent per annum to this date, unless you believe that the negligence of plaintiffs or any of them proximately caused or contributed to the damage."

The contention of appellant under the assignment is that the charge is erroneous in that the telegram informed the company that Robertson could get an option on the land at $1.25 per acre for forty days, and that by the answer of Connell & Jowell he was authorized to close the trade, and that as the undisputed evidence shows that Robertson did not get an option on the land for forty days, but purchased the same, paying a cash consideration of $500, with balance payable in installments, the charge is not supported by the pleadings and evidence.

As before intimated, it was a matter of no moment to defendant whether an option on the land was obtained by plaintiffs or a purchase was effected by them, inasmuch as the telegram informed them that a business transaction in the nature of an option to purchase land at a certain price was pending, in which $500 was required to

be put up by plaintiffs; for the company, if it could have reasonably contemplated the $500 would be put up and lost by plaintiffs in consequence of its mistake in transmitting the telegram, should be held liable for such consequences. When one has an option to purchase land on certain terms within a given time, he may exercise his option to purchase just as soon as such option is obtained. In other words, he can elect at once to close the transaction by making the purchase without clothing the transaction in the garb of an option; and the party through whose mistake he has been induced to do so, when the loss occasioned thereby must have been the same from taking an option, can not be heard to say: "I am relieved of any liability for my mistake because you purchased outright instead of taking an option to purchase within a given time upon the same terms." In either event the consequences would have been the same, which could have been readily contemplated by the defendant when it received the telegram for transmission. This also disposes of appellant's fifth, seventh and ninth assignments.

4. Under the fourth assignment of error, which complains of the court's refusing to give, at defendant's request, a peremptory instruction to the jury to return a verdict for defendant, is asserted this proposition: "There is a fatal variance between the contract sued upon and the contract claimed to have been made by the plaintiffs, and the charge should have been given to the jury." We will dispose of this assignment by making a quotation from Galveston, H. & S. A. Ry. Co. v. Grant, 58 Texas Civ. App., 181 (124 S. W., 147), which is as follows: "The conformation of 'plaintiff's proof to the allegations in his petition' should be enforced at that stage of the trial when the evidence is being introduced; and if evidence is offered which does not conform to such allegations, then is the time the defendant should object to its introduction and reserve a bill of exceptions to the action of the court in admitting it over such objection; for, when evidence is admitted without objection, the question of variance can not be raised upon an instruction to the jury. International Harv. Co. v. Campbell, 43 Texas Civ. App., 421 (96 S. W., 99); Moffatt v. Sydnor, 13 Texas, 628; Huston v. Clute, 19 Texas, 178; Mangum v. The Bullion B. & C. Min. Co., 15 Utah, 634, 50 Pac., 836; 14 Ency. Pl. and Prac., 346."

This also disposes of the eleventh assignment of error.

5. The sixth assignment of error complains of the court's refusing to give, at defendant's request, this charge: "You are instructed that the plaintiffs were copartners in the transaction out of which this suit originates, and the knowledge of the plaintiff Robertson of the price to be paid for the said land, $1.25 per acre, affected with notice his copartners, Connell & Jowell, and in that event plaintiffs would not be entitled to recover." It would be extending the doctrine that knowledge of one partner of a fact is notice to all the members of the firm of such fact, to an unwarrantable length, to hold that when a partner, to whom a business proposition has been made, writes a message embodying the terms of the proposition to the other members of his firm and delivers it to a telegraph company for transmission, and asks them what he must do in regard to the matter, and the

company, through mistake in its transmission, delivers to his copartners a message containing essentially a different proposition, the members to whom the message is directed are charged with notice of the proposition because the member of the firm who sought to impart it to them by wire had knowledge of its terms. The requested charge, when considered in connection with the facts, is self-refutatory.

6. Our conclusions of fact dispose of the twelfth assignment of error, which complains that the verdict is contrary to and not supported by the evidence in finding that plaintiffs were not guilty of contributory negligence, adversely to defendant.

There is no error in the judgment and it is affirmed.

Affirmed.

W. E. TROTTI v. GAAR, SCOTT & COMPANY.

Decided March 3, 1910.

Principal and Surety—Promissory Note—Assumption by Third Party—Extension of Time—Surety not Released, when.

When one for a valuable consideration becomes a surety on promissory notes at the time they are executed, and agrees that payment of said notes might be extended without notice to him and without affecting his liability, and subsequently, for the purpose of protecting himself against probable loss, is instrumental in having the makers of the notes sell and transfer to a third party the property for the purchase money of which the notes were given and extension of time of payment granted by the holder of the notes to the party assume the payment of said notes, such surety will not be discharged by an extension of time of payment granted by the holder of the notes to the party assuming their payment.

Error from the District Court of Jefferson County. Tried below before Hon. L. B. Hightower, Jr.

W. W. Blake and *Roi Blake,* for plaintiff in error.—Contracts are binding only on the parties to them. Defendant sold the property to Byerly and took his note in payment, and plaintiff endorsed the note, which contained an agreement that time of payment might be extended to Byerly without notice to plaintiff. But when Byerly delivered up the property (which was security for the debt) to the defendant (who was the seller), and the same was sold to a third person (Seale) in consideration of the assumption of the notes and the extension of the time to Seale, plaintiff could not be bound by this later contract, and it would release him from the agreement and from liability as endorser. Morris v. Booth, 18 S. W., 639; Heaton v. Angier, 7 N. H., 397; Kountz v. Holthouse, 85 Pa., 235; Byles on Bills, 384; Story on Promissory Notes, sec. 416.

A new debtor (C. N. Seale) having been substituted by written contract with the original creditor, joined by the original debtor, constitutes a complete novation of the original contract and releases the surety on the old contract. Gimble & Sons v. King, 43 Texas Civ.

App., 188; Brown v. Fountain, 3 Texas Civ. App., 232; Bank of Uniontown v. Mackey, 140 U. S., 220; 29 Cyc., 1136; 24 Am. & Eng. Ency. Law, 833-837, 1 ed.

Crook, Lord & Lawhon, for defendant in error.—In the absence of clear and convincing proof that at the time Gaar, Scott & Company agreed that C. N. Seale might assume the payment of the notes and retain the machinery, that there was an agreement among all the parties that Byerly Brothers and W. E. Trotti should be released and the old debt discharged, plaintiff in error Trotti could not defeat the liability on said notes by reason of the agreement with Seale. Scott v. Atchison, 36 Texas, 76, 38 Texas, 384; Gimble & Sons v. King, 43 Texas Civ. App., 188, 24 Cyc., 1131.

McMEANS, ASSOCIATE JUSTICE.—Suit by Gaar, Scott & Co., a corporation, against W. F. Byerly and J. W. Byerly on four promissory notes aggregating $1,585, and against W. E. Trotti as surety upon two of said notes first maturing, aggregating $796, less a credit of $95.12.

The notes were executed for the payment of the purchase money for certain sawmill machinery purchased by Byerlys from Gaar, Scott & Co., and were secured in part by a mortgage upon the machinery, and a foreclosure of the mortgage was prayed for.

Upon an allegation in the petition that plaintiff entered into an agreement in writing with C. N. Seale whereby said Seale, with the knowedge and consent and for the benefit of the defendants Byerly and Trotti, took over the mortgaged property and bound himself to pay the four notes sued upon, and in further consideration for his obligation to pay same plaintiff had extended the time of payment of the two notes first maturing, said Seale was made a party defendant, and a judgment was prayed for against him also.

Defendant Trotti answered by general denial, and specially pleaded that he endorsed the two notes referred to as an accommodation endorser, and without consideration, and that if he had ever been bound as surety by such endorsement he had been released from liability by the act of plaintiff in repossessing itself of the mortgaged property and selling the same to Seale, and in granting to Seale an extension of time for the payment of the notes upon which he was endorser.

The case was tried by the court without a jury, and resulted in a judgment for plaintiff against all defendants for the amount of the two notes first maturing, and against the Byerlys and Seale upon the remaining notes, and for foreclosure of the mortgage lien upon the property described in the mortgage. From this judgment defendant Trotti alone has appealed.

The court filed its findings of fact and conclusions of law, which we adopt, and copy so much of same as bears upon the issues presented on Trotti's appeal:

"First. I find that on April 9, 1906, the defendants, W. F. Byerly and J. W. Byerly, purchased from plaintiff Gaar, Scott & Co. . . ." (Here follows a list of the property purchased.)

"That the defendants, W. F. and J. W. Byerly, purchased said ma-

chinery for the purpose of running and operating a sawmill in the town of Jasper, Jasper County, Texas, and that in payment of said machinery the defendants, W. F. and J. W. Byerly, on April 9, 1904, executed and delivered to plaintiff four promissory notes, the first three of which notes were in the sum of $398, and the fourth of said notes for the sum of $391, said notes being due and payable on or before the 1st day of July, 1906, on or before the first day of November, 1906, on or before the first day of March, 1907, and on or before the first day of August, 1907, respectively, in their order, all of said notes bearing interest at the rate of eight percent per annum from date until due and ten percent per annum after maturity, and providing for ten percent attorney's fees if said notes should be placed in the hands of attorneys for collection or if suit were brought, and that simultaneously with the execution of said notes defendants, W. F. Byerly and J. W. Byerly, gave to the plaintiff a chattel mortgage on the property hereinbefore described to secure the payment of said notes.

"Second. I further find that the defendant W. E. Trotti, at the time of the signing of said notes by W. F. and J. W. Byerly, became a surety on the first two of said notes, and that his becoming a surety thereon was based on a valuable consideration, such consideration being a contract between the defendant Trotti and the defendants W. F. and J. W. Byerly, whereby the said Byerlys were to sell to the defendant Trotti and C. N. Seale, a firm doing business under the name of Sandy Creek Lumber Company, the entire output of the sawmill to be operated by the defendants W. F. and J. W. Byerly.

"Third. I further find that after the delivery of said notes and mortgage the defendants W. F. and J. W. Byerly commenced the operation of the sawmill, but that they did not make a success of said business, and on account of their inability to further operate said mill they were forced to close it down, and that the defendant W. E. Trotti, in order to protect himself by reason of becoming a surety on the two notes hereinbefore mentioned, induced the defendants W. F. and J. W. Byerly to transfer the property on which plaintiff held its mortgage to the defendant C. N. Seale, the defendant Seale agreeing to assume the payment of the four notes hereinbefore mentioned, and that such agreement was consummated on the first day of September, 1906, on which date the defendants W. F. and J. W. Byerly transferred to C. N. Seale by written bill of sale all of their right, title and interest in and to the property on which plaintiffs held their mortgage, and a part of the consideration of said transfer was the assumption of the defendant Seale of the payment of said notes, all of which were unpaid on said date. That said arrangement was made without the knowledge or consent of the Gaar, Scott & Co., but with the full knowledge and consent of the defendant, W. E. Trotti, who assisted in negotiating the transfer of said property to the defendant C. N. Seale. That the defendant Trotti helped negotiate said sale for the purpose of getting the property into the hands of the defendant C. N. Seale, and with the expectation that Seale would make a success in operating said mill, and would thereby pay off the notes due to Gaar, Scott & Co., and by making such payment would re-

lieve the defendant Trotti of liability by reason of his becoming surety on the first two of said notes.

"Fourth. I further find that after the consummation of the sale of property by W. F. and J. W. Byerly to C. N. Seale that the plaintiff was made aware of such transfer, and that at the request of the defendant Trotti agreed that the defendant Seale might continue to hold the property under transfer from the defendants W. F. and J. W. Byerly in consideration that the defendant Seale would assume the payment of the said notes and mortgage, but I find that there was no agreement on the part of Gaar, Scott & Co. to release either W. F. Byerly and J. W. Byerly or the defendant W. E. Trotti, and that the agreement of Seale to assume the payment of the notes was intended that the said Seale should become jointly liable with the other defendants as to payment of said debt.

"Fifth. I further find that when Gaar, Scott & Co. entered into the agreement with the defendant Seale, wherein said Seale agreed to assume the payment of said notes, the plaintiff Gaar, Scott & Co. agreed to extend the time of payment of the first two of said notes, the first of said notes at the time being due, and plaintiff agreed to extend the time of payment of the first note until November 1, 1906, and that if first note was paid on November 1, 1906, to extend the second note until December 1, 1906; and I also find that the defendant W. E. Trotti, at the time of becoming surety on said notes, agreed that payment of said notes might be extended without notice to him and without affecting his liability.

"Sixth. I find that none of said notes have been paid with the exception that $95.12 was paid on the first of said notes on April 15, 1907, and that the balance due on all of said notes, together with ten percent attorney's fees, remains due and unpaid.

"Seventh. I find that under the terms of the mortgage on said property that it is provided that in case of foreclosure of said mortgage that the proceeds of the sale of said property would be applied as follows: First, to the court costs and expenses of taking, keeping and selling the same; second, on the indebtedness secured by said mortgage, based on the notes on which there were no sureties, endorsers or guarantors; third, on the indebtedness based on notes on which there were sureties, endorsers or guarantors, and that the notes upon which the defendant W. E. Trotti became surety provided that said surety sign the same subject to all the terms and provisions of said mortgage, and that the said W. E. Trotti became surety on said notes with full knowledge of all the provisions of said mortgage, and that he expressly agreed to become bound by the terms thereof."

Conclusions of law.—"First. I find, as a matter of law, that the agreement between the plaintiff and C. N. Seale whereby time of payment of the notes guaranteed by the defendant Trotti was extended, did not have the effect of releasing the defendant Trotti of liability thereon.

"Second. I find, as a matter of law, that the transfer of property from W. F. and J. W. Byerly to C. N. Seale, wherein it was agreed that the defendant Seale should assume the payment of all of said

notes, which agreement was assented to by Gaar, Scott & Co., as shown in the foregoing findings of fact, did not release the defendant Trotti from liability on the two notes on which he was surety.

"Third. I find, as a matter of law, that the plaintiff should have judgment against the defendants W. F. and J. W. Byerly and C. N. Seale and the defendant W. E. Trotti for the amount of the principal, interest and the attorney's fees due on the first two of said notes, less credit of $95.12 on the first of said notes of date of April 15, 1907, and that the plaintiff should have judgment against the defendants W. F. and J. W. Byerly and C. N. Seale for the principal, interest and attorney's fees due on the last two notes, and that plaintiff's mortgage should be foreclosed, and that the proceeds of said sale should be applied, first, to the payment of court costs and expenses of keeping and selling said property; second, to the payment of the amount due on the two notes on which the defendant Trotti is not surety; third, to the payment of the notes on which the defendant Trotti is surety, and the balance, if any, to the defendant C. N. Seale.

"Fourth. I find, as a matter of law, that the defendant W. E. Trotti is a surety on said notes, and that after the above described personal property on which plaintiffs hold their mortgage has been sold and applied as hereinbefore set forth, that if the judgment against the defendant W. E. Trotti is not satisfied, that execution should issue against all of said defendants, but that the sheriff shall first make levy upon the property of the defendants W. F. Byerly, J. W. Byerly and C. N. Seale, if so much of the property of said defendants can be found in the county of Jefferson as will be sufficient to satisfy said judgment; but if enough property of said defendants can not be found to satisfy said judgment against defendant Trotti, then he be directed to levy upon the property of the defendant W. E. Trotti, and that the attachment liens hereinbefore set forth should be foreclosed and said property sold to satisfy the judgment against the defendant W. E. Trotti, in case the same is not collected against the other defendants as hereinbefore set forth, and that if said property shall not sell for enough to satisfy said judgment execution should issue against the defendant W. E. Trotti for the balance, and judgment is accordingly so entered."

The appellant by appropriate assignments of error has attacked the court's second, third and fourth findings of fact as not being supported by the testimony. We have examined the record, and find that each of the findings complained of is amply supported by the testimony, and the assignments can not therefore be sustained.

We think that the court's conclusions of law, based upon the facts as found, are correct, and therefore the appellant's assignments of error complaining of the court's first, second and third conclusions of law must be overruled.

We think that none of the assignments present any reversible error, and are of the opinion that the judgment of the court below should be affirmed, and it is so ordered.

Affirmed.

Writ of error refused.

J. B. BALLARD ET AL. v. BOWIE COUNTY.

Decided March 3, 1910.

1.—Public Road—Recognition and Use—Prima Facie Case.

Evidence of use of a road by the public for many years, its survey by a jury of view, and the subsequent appointment of overseers and improvement as a highway by the authorities, was sufficient, as against one enclosing it, but making no proof of title in himself, to make a prima facie case that it was a public road, though not shown to have been established by the methods recognized by law.

2.—Public Road—Change.

A public road can only be changed in the manner provided by law and by the Commissioners' Court. (Rev. Stats., arts. 4672, 4696). Proof that a part of it was enclosed by one claiming title and that thereafter the line as changed by the enclosure was worked and bridged under the direction of the Commissioner of the precinct, did not establish such lawful change.

3.—Public Road—Class.

The evidence being held sufficient to show prima facie the establishment of a first class road, the action of the Commissioners' Court in ordering the removal of obstructions to same for the width of forty feet, the minimum legal width for a road of such class, was proper.

Appeal from the District Court of Bowie County. Tried below before Hon. P. A. Turner.

N. L. Dalby and *T. N. Graham,* for appellants.—The evidence was insufficient to show a highway by prescription or its establishment in accordance with statute. Worthington v. Wade, 82 Texas, 28; Gulf, C. & S. F. Ry. Co. v. Montgomery, 85 Texas, 67; Gilder v. City of Brenham, 67 Texas, 345; De George v. Goosby, 33 Texas Civ. App., 187; Cunningham v. San Saba County, 1 Texas Civ. App., 480; International & G. N. R. Co. v. Cuneo, 47 Texas Civ. App., 622.

Patrick G. Henry, for appellee.—When the general public, under a claim of right, used a defined way without interruption for the longest period of limitation, adversely to the owners of the land and the county asserts a right to the use of the land for a public road, it becomes one by prescription. Franklin County v. Brooks, 68 Texas, 679; Berry v. State, 12 Texas Crim. App., 249; Michel v. State, 12 Texas Crim. App., 108; McWhorter v. State, 43 Texas, 666; Markham v. Railway Co., 1 W. & W., sec. 81; Click v. Lamar County, 79 Texas, 121; Ward v. State, 42 Texas Crim. App., 435; Cunningham v. San Saba County, 1 Texas Civ. App., 480; Race v. State, 43 Texas Crim. App., 438.

It will be presumed, after so many years of use and work and improvement upon said road by the county, without objection of abutting owners of land, that they acquiesced in its use, and that the Commissioners' Court complied with the provisions of the law. Rev. Stats., arts. 4359 to 4390; Franklin County v. Brooks, 68 Texas, 679; Ward v. State, 42 Texas Crim. App., 435; City of San Antonio v. Grandjean, 91 Texas, 430; McWhorter v. State, 43 Texas, 666.

HODGES, ASSOCIATE JUSTICE.—This is an action instituted by Bowie County, in which a mandatory writ of injunction is asked for to compel the appellants to remove certain obstructions placed by them on one of the public roads of the county. The petition, among other things, alleges the public character of the road in question, and that the appellants have constructed fences across it at various places. The appellants, after specially excepting to certain portions of the petition, pleaded general denial, not guilty, estoppel, and abandonment by the county of that portion of the highway on which the obstructions were placed. There was also a plea claiming that the obstructions had been placed there more than ten years before the institution of this suit. A trial before the court without a jury resulted in a judgment in favor of the county.

The assignments of error, presented in different forms, complain of the insufficiency of the eidence to support the judgment. The testimony shows that the road had been used by the public as a highway for forty years or more, and that it connected two important settlements of the county. In 1888 a jury of view was appointed by the Commissioners' Court of Bowie County for the purpose of surveying and locating a public road along this roadway. Two of the members of that jury testified to their appointment, and that they had located and marked out a public road of the first class along that old road. The testimony also shows that from and after that time overseers were appointed, hands were apportioned, and this road worked under the supervision of the county; that it was generally regarded and used as one of the public roads of the county from that time. No question is now made about all of it, except that which has been enclosed by the fences of the appellants, being still one of the public highways of the county. It is claimed, however, by the appellants that the appellee failed to show that this public road had been acquired or established in some of the methods recognized by law; that there was no evidence to prove that the report of the jury of view had been approved, or that any order was made by the Commissioners' Court at any time establishing this road as a public road of the first class. In other words, it is contended that the plaintiff in the suit had failed to prove title to the easement which it asserts. In the present state of the record, we do not think more evidence was necessary. When the appellee proved that the road had been actually used and treated by the county as one of its public highways for any reasonable length of time, it made at least a prima facie case sufficient as against all parties not showing a superior right to the premises over which the road was located. McWhorter v. State, 43 Texas, 666; Lamar County v. Click, 79 Texas, 124, 14 S. W., 1048; Race v. State, 43 Texas Crim. App., 438, 66 S. W., 560; Texas & P. Ry. Co. v. Kaufman County, 17 Texas Civ. App., 251, 42 S. W., 586; Hall v. City of Austin, 20 Texas Civ. App., 59, 48 S. W., 53; Compton v. Waco Bridge Co., 62 Texas, 722. This holding is analogous to the rule in actions of trespass to try title, which permits the plaintiff to recover against a mere trespasser upon proof of prior possession. Such possession, whether as to the fee or the easement, is some evidence of ownership; but the fact that it may be overcome by counter-

proof showing an opposing claim supported by superior evidence of actual ownership, does not challenge the correctness of the proposition. We do not mean to say that the testimony here relied upon by the appellee as showing the right in the public to the easement claimed would be sufficient as against one who had proved ownership of the fee in the premises, but only as against one who had failed to show any such rights. In this case the appellants offered no proof whatever of their title, if any they had, or proof of any title inconsistent with the claim asserted by the county. For aught that appears in the record to the contrary, they may have been mere trespassers encroaching upon the public highway without any semblance of right to the premises upon which they placed the fences. The fact that they claimed to own the land over which the road ran is not proof of that fact in this suit, any more than a similar claim would be in an action involving title to the fee. Hence the prima facie case made out by the county, that this roadway was a public highway of the first class, was not met, and the court was amply justified in concluding as he did upon that issue.

It is true the testimony shows that the obstructions in question, or part of them, were placed upon the road several years ago, and that before and since that time the change thereby made in the course of the road has been acquiesced in by the commissioner of that precinct and worked by the hands who have been assigned to that section. This feature of the case involved the legality and regularity of changing the course of an established public road. The statute has provided a method, and the only method, by which this can be done in a manner binding upon the traveling public. It provides that the Commissioners' Court may alter or change the course of a public road in accordance with the provisions of law, after notice, upon application, in the same manner as is provided for the discontinuance of a road, except that the application need not be signed by more than one freeholder of the precinct in which the alteration or change is proposed to be made. It is also provided that no public road shall be altered or changed except for the purpose of shortening the distance from the point of beginning to the point of destination, unless the court, upon full investigation of the proposed change, finds that the public interest will be better served by making the change, and that said change shall be by unanimous consent of all the commissioners elected. Revised Civil Statutes, arts. 4672, 4696. It was shown affirmatively by the plaintiff in this suit that no such official action had ever been taken by the Commissioners' Court upon any application to change the course of the road at the places where the obstructions were located. It was shown that a petition to that effect had been presented, and the court had refused to order the change made; that the change relied upon was made by some one at the instance of the commissioner of that precinct without any order of the court, and that the hands apportioned thereafter worked the road, and bridges were constructed upon the new road. This appears to be the only authority relied upon by the appellants for having made the change. This unauthorized action of the commissioner would not be binding upon the county as the representative of the traveling public, who had a right to continue the

use of the former roadbed until changed in the manner pointed out by the statute. When a public highway has once been established, the public has a right to its continued existence as such, and upon the very ground on which it is located, until it is changed or altered in a manner authorized by law.

It is complained that the evidence was insufficient to justify the court in directing the opening to be forty feet wide. The statute provides that a road of the first class shall be not less than forty nor more than sixty feet in width. The testimony, we think, was sufficient to justify the court in concluding that a road of the first class had been established upon this ground, and there was no error in giving the minimum width.

Most of the testimony of the witnesses appears to have been given with reference to a diagram used upon the trial, and the record of this testimony is in such a condition that we are unable to determine in many important instances what the witnesses really meant. Those were all matters before the court, and we may properly assume that they were sufficient to justify the conclusions reached.

We do not think there was any error in the judgment, and it is accordingly affirmed. The writer claims no credit or responsibility for the poetic effusions which follow.

LEVY, ASSOCIATE JUSTICE.—I fully agree to the disposition of the appeal as to the case made in the record.

In the brief appears the following pleading written by Hon. Patrick G. Henry, county attorney, and kinsman of the illustrious statesman:

We plead for the old roadway,
  That runneth through the wood
We plead for the old roadway,
  That for generations stood,
Upon ground broad and rolling;
  Within the forest shade,
That runneth now, and yet should run,
  When we are lowly laid.

New people came, the old ones fell;
  And time hastily flew;
All were friends to the old roadway,
  While stronger yet it grew,
The infant that saw it first,
  Has feeble grown and gray;
But the old roadway, an aged way,
  Grew more public every day.

For answer to this entreaty that this court do decree that this "old roadway that runneth through the wood yet should run when we are lowly laid:"

Stern and calm in their primal strength,
As when they came from the hands of God,
The great forests bend and sway in the wind,
Their roadways yet by man untrod.
Deep in their bosom the laws of life,
Of death and birth, content and fear,

Go on for thousands of beast and bird;
A space they breathe and disappear.
But the seasons pass, as night and day,
And the forest roads unchanging stand
And hide their dens of primal life—
They are not slaves of the need of Man.

But the years unearthed both strength and wealth
When the silent forest heart they smote,
And the smokes of a hundred factories rise
Where shining mists erstwhile did float.
Creatures of steel run the path of the deer,
And teeming piles of brick and stone
Raise a myriad of eyes to the busy throng,
Where the free wild bird in peace has flown.
The thousand-handed gnome of Use
Has touched the old road with his wand;
It bows and dies at the beck of Growth—
Man needs and the earth must needs respond.

Affirmed.

OGBURN-DALCHAU LUMBER COMPANY v. R. W. TAYLOR.

Decided March 3, 1910.

1.—Venue—Lien—Place of Performance.

Transactions concerning a sale of lumber held not to show a lien by the seller on lumber sold which the purchaser refused to take nor a written contract by the purchaser to perform in the county. The purchaser being a resident of another county, his plea of privilege to be there sued should have been sustained.

2.—Sale—Passing Title.

A contract for sale of specific lumber in the hands of the seller to be shipped to the purchaser and be paid for by him in the future, is held to evidence a completed sale by which the lumber became the property of the purchaser.

3.—Sale—Refusal to Receive and Pay—Election of Remedies.

The seller of personal property, on the refusal of the buyer to receive same may elect between the remedies open to him: (1) Hold the property as the purchaser's and sue for the contract price (for which he would have a lien on the property); (2) sell it to another and recover the difference between the contract price and that obtained (by which his lien against the first purchaser would be lost); (3) keep the property as his own and recover the difference between the market and the contract price. But the buyer can not elect one alternative as to part of the property and another as the rest, and his sale of a part to a third person was a choice which waived his lien as to all, being an election as to all of the second remedy.

4.—Sale to Another.

The resale by the seller, of property which the buyer refused to accept was an election of his remedy by suit for the difference between the price promised and that realized on resale, though the second purchaser was to store the property subject to the first purchaser's demand to deliver on the first sale. It placed delivery to the first buyer out of the seller's power, and substituted for his own the liability of another to make delivery. Especially was the seller bound by such election where other property was mingled with that transferred by the resale.

5.—Contract—Place of Performance.

The owner of lumber in H. county by contract in writing sold it to a

purchaser in D. county, to whom it was to be shipped for a named price f. o. b. cars, the place of payment not being designated. Held, that it was not a contract to be performed by the buyer in H. county, so as to give venue there in a suit to which he interposed his plea of privilege.

Appeal from the District Court of Harrison County. Tried below before Hon. W. C. Buford.

Chilton & Chilton, for appellants.—Defendant was entitled to a peremptory instruction in its favor on its plea of privilege. Russell v. Heitman, 86 S. W., 75; McLaughlin v. Shannon, 3 Texas Civ. App., 136; Cohen v. Munson, 59 Texas, 236; Holloway v. Blum, 60 Texas, 625; Keppert v. Aultman, 25 Texas Civ. App., 495; Bewley v. Schultz, 115 S. W., 294; Borden v. Le Tulle Co., 32 Texas Civ. App., 477; Mahon v. Cotton, 13 Texas Civ. App., 239; Keller v. State, 87 S. W., 669; Chamberlain v. Fox, 54 S. W., 297; Keeler v. Paulus, 43 Texas Civ. App., 555.

Plaintiff elected to realize on the lumber when he began to sell it to the Harrison County Lumber Company. Waples v. Overaker, 77 Texas, 7; Lewis v. Steiner, 84 Texas, 364; Carver v. Graves, 47 Texas Civ. App., 481; Sour Lake T. Co. v. Deutser & Co., 39 Texas Civ. App., 86;; Parlin & Orendorff Co. v. Harrell, 8 Texas Civ. App., 368.

S. P. Jones, for appellee.—This was a contract in writing promising performance in Harrison County, Texas, and the venue was properly laid in Harrison County, Texas. This was also a suit to foreclose a lien upon property situated in Harrison County, Texas, at the time suit was instituted and at the time jurisdiction of the court attached. Rev. Stats., art. 1194, secs. 5, 12; Darragh v. O'Connor, 69 S. W., 646; Yett v. Green, 39 Texas Civ. App., 184; Bell County Brick Co. v. Cox & Co., 33 Texas Civ. App., 292; Callender v. Short, 34 Texas Civ. App., 364; Hilliard v. White. 31 S. W., 553; Higgins v. Frederick, 32 Texas, 283.

HODGES, ASSOCIATE JUSTICE.—This is an action to recover the contract price of certain lumber alleged to have been sold by the appellee to the appellants, and, in the alternative, damages for a breach of a contract to purchase lumber. The appellee was the owner of a lot of lumber situated at and near Harleton, in Harrison County. The appellants were a partnership doing business under the firm name of the Ogburn-Dalchau Lumber Company.

The petition contains two counts. In the first it was alleged that the appellee was the owner of a mill cut of lumber amounting to 1,136,730 feet, giving the number of pieces and dimensions, situated at Harleton, in Harrison County; that on the 25th day of March, 1907, the appellants purchased this lumber from the appellee and agreed to pay therefor $17,005, or $15 per thousand feet. A portion of the contract of purchase was embodied in the following written instrument: "March 25, 1907. We have this day sold to the Ogburn-Dalchau Lbr. Co. the following lumber: (Then follows description of the lumber, giving the number of feet and dimensions, together with

the price, and in some instances the number of pieces of a particular kind. The description is divided into groups designated as 'orders,' making in all fifteen distinct and separate orders.) Lumber is sold f o. b. cars at Harleton, Texas, at the above prices; and I also agree to pay planer prices to the Ogburn Lbr. Co.

"S. & E., including 1 x 12 at.....	$1.25	per	M.
"S2S	1.50	"	"
"Shiplap S2S	1.75	"	"
"Shiplap S1S	1.50	"	"
"1 x 4 & 1 x 6 D. & M.	2.25	"	"

"I also agree to pay stopping charges of $5 a car at Marshall, so as to make these prices net to the Ogburn-Dalchau Lbr. Co., allowing the usual 2 percent discount for advance made on invoices, said lumber sold on the basis of grades and weights to the association of the Lumbermen's Association. (Signed)

"R. W. Taylor,
"J. W. Ogburn Lbr. Co.,
"Per J. W. Ogburn, Prest."

It is alleged that the above written instrument was prepared by the appellants through J. W. Ogburn, one of their members; that Ogburn, acting for the appellants, on the same day purchased 80,155 feet of lumber in addition to the above at an average price of $13.83 1/3 per thousand. Both of said contracts were to be performed in Harrison County. It is further alleged that up to the 19th day of June, 1907, the appellee had delivered ..... feet of said lumber, leaving still on hand 597,490, giving the number of pieces and dimensions, amounting in the aggregate in value to $9,417.52. It is averred that on June 19, 1907, the appellants stopped further shipments, and that since that time they have declined to receive and pay for any more of said lumber; that all of the undelivered lumber was then situated in Harrison County, and was so located when sold; that the appellants are the owners of the lumber charged with the purchase price, and that appellee has nothing further to do with it except to load it on the cars and ship it to them, all of which he has attempted in good faith to do; that by reason of the refusal of the appellants to receive and pay for the remainder of the lumber they are indebted to him for the value thereof, to wit, $9,417.52. Appellee also alleges the existence of a seller's lien, and asks for its foreclosure. In the second count he pleads that if for any reason it should be held that the negotiations referred to between the appellants and the appellee did not amount to an absolute sale of the lumber to appellants, then there was a contract of sale for the amount before named at the prices stated; that the appellants had agreed to accept and receive the lumber when it should be loaded and shipped within a reasonable time; that the appellee had fully performed his part of the contract, but that the appellants had refused to receive and pay for more of the lumber, and he was thereby prevented from making the remainder of the shipments; that the market price had

declined to $8 per thousand feet less than the contract price, and appellee had been damaged in the sum of $4,000. He also alleges that the lumber was still in his possession, and asks for a foreclosure of his seller's lien.

The appellants filed a plea of privilege, claiming the right to be sued in Dallas County, the place of their residence. The plea contained the usual averments required by statute, and further denied specifically the facts relied upon in the petition as showing the existence of a lien, or that the portion of the contract in writing evidenced any obligation to be performed by them in Harrison County. Appellants further answered generally and specifically, but, inasmuch as the facts put in issue by the remainder of their answer are not material to be considered in the disposition we make of the case, it is unnecessary to further notice them.

The case was continued at different terms of the court, the plea of privilege being protected by appropriate orders. On June 10, 1909, the term at which the case was tried, the appellee filed what he styles his "first supplemental petition," in which he alleges, among other things, that since the institution of this suit, in order to protect the lumber and save it from waste and further depreciation in value, he had sold the larger portion of it for the best price obtainable. The amount sold is placed at 586,000 feet, for which he says he received a price of $4 per thousand less than the contract price he was to receive from appellants. He further claims that he incurred expenses in making these sales, for which he asks reimbursement.

The case was submitted to the jury on special issues, and upon the answers returned the court entered a judgment in favor of the appellee for $2,158.35. The appellants requested a peremptory instruction directing the jury to return a verdict in their favor upon their plea of privilege. This was refused by the court, and that ruling is made the basis of the assignments of error which we will now consider.

It is not denied that the appellants reside in Dallas County, and could not, over their objections, be sued in Harrison County unless by reason of some of the statutory exceptions to the general rule. The venue in Harrison County is sought to be sustained: (1) By subdivision 12 of article 1194 of the Revised Civil Statutes, which permits a suit for the foreclosure of a mortgage or a lien to be brought in the county in which the property subject to such lien, or portion thereof, may be situated; (2) by subdivision 5 of the same article, which provides that where a person has contracted in writing to perform an obligation in any particular county, suit may be brought either in such county or in the county where the defendant has his domicile.

Considering these exceptions in the above order, the first inquiry should be, does the evidence show this to be a suit for the foreclosure of a mortgage, or lien, on property situated in whole or in part in Harrison County? The venue of an action of the class to which this belongs is not to be determined solely by the averments of the pleader, but by the facts which the proof shows existed at the time suit was filed. Hilliard v. Wilson, 76 Texas, 180, 13 S. W., 125; Townes on Pleading, 362. It therefore becomes necessary to refer to the evidence

adduced upon the trial. If at the time this suit was instituted the appellee held the lien which he here asserts, then the jurisdiction of the court properly attached, and would not be divested by the subsequent loss or abandonment of the lien in changing the form of the action. The facts developed upon the trial, we think, justify the conclusion that the negotiations between Taylor and the appellants resulted in a completed sale of the lumber, and that there was a transfer of the title; that nothing remained for Taylor to do except to load and ship according to instructions given and to be given. The facts also show that on June 19, 1907, the time when it is alleged that appellants refused to accept further shipments, Taylor had all of the undelivered lumber in his possession. According to his testimony, the undelivered remnant then amounted to something in excess of 500,000 feet. Under such conditions, where the sale is a cash transaction, or where credit is given and the purchase price becomes due before delivery, the seller would have a lien subject to be foreclosed in a court of competent jurisdiction. 2 Mechem on Sales, secs. 1471-1474, 1521; 1 Jones on Liens, sec. 852. While the testimony in this case shows that the sale was not for cash, but that time was given within which to pay the purchase price after the delivery of the lumber at its final destination, it must be held that such credit was extended upon the condition that orders would be given and the shipments received within a reasonable time after the making of the original contract of sale, and that a repudiation of the contract by a refusal to receive and pay for more lumber authorized the appellee to demand immediate payment of the balance of the purchase price found to be due. In using the language here employed we do not wish to be understood as now determining that the contract had been broken by the appellants, but that we so regard it merely for the purpose of passing upon this plea of privilege in discussing the question of a lien *vel non*. No time having been specified in either the written or oral agreements, it must have been contemplated that shipments should be ordered out within a reasonable time, and payments made accordingly after the shipments reached destination and settlement was made with the final purchasers.

But proceeding upon the assumption that the appellants breached their contract by refusing to accept and pay for the remnant of lumber left on Taylor's hands on the 19th day of June, 1907, and that Taylor, under the terms and conditions of his contract, was entitled to then assert a seller's lien against this undelivered balance, it does not follow that this lien was preserved and held till the filing of this suit. The general rule as to remedies of the seller when the buyer refuses to receive and pay for the articles sold, where the possession and not the title remains in the seller, is thus stated by Mechem on Sales, vol. 2, sec. 1678: "(1) He may store or retain the property for the vendee and sue him for the entire purchase price; (2) he may sell the property, acting as the agent for this purpose for the vendee, and recover the difference between the contract price and the price obtained on such sale; or (3) he may keep the property as his own and recover the difference between the market price, at the time and place of delivery, and the contract price." This general rule seems

to have met with the approval of the Supreme Court of this State, as well as the courts of other jurisdictions. Waples v. Overaker, 77 Texas, 7, 13 S. W., 527. These remedies are not concurrent, but inconsistent. Westfall v. Peacock, 63 Barb. (N. Y.), 209; Dreyfuss v. Foster, 3 N. Y. Supp., 54. The inconsistency goes, at least, to the extent of forbidding the election by the seller of different remedies in dealing with different portions of the property forming the subject matter of the same contract. When the contingency arises—that is, when the contract is broken—the seller, having the choice of the remedies which the law gives him, is put to an election; and, having made one, and dealt with a portion of the property left in his possession in accordance with that remedy, he must pursue the same remedy as to all. His subsequent relations to the property will be determined by the remedy which he first chooses and undertakes to enforce. Of those mentioned above, the first involves a continued recognition of the title of the vendee in the undelivered goods, is a demand by the seller for the entire unpaid purchase price, and not a claim for damages for a refusal to perform the contract. The second and third are consistent only with claims for damages to be measured, not by the contract price alone, but by the difference between that price and the value of the undelivered goods, this value to be ascertained in one or the other of the methods which may be adopted. In one case the price realized at a resale, and in the other the market value of the goods, is selected as the amount with which to compare the contract price in arriving at the damages sustained. If the seller elects to treat the property as still belonging to the vendee, and seeks to recover the entire contract price, he must hold all the property in readiness to be delivered to the owner upon a demand accompanied by full payment of what is due. If he has placed any portion of the property beyond his power to so deliver he is not entitled to the contract price, for he has himself, in such an instance, departed from the terms of the contract, and is in no attitude to demand full performance by the vendee. He can not hold the latter liable for the full amount of the price for which the goods were sold and then deprive him of all or any portion of the goods. We will now undertake to apply these principles to the facts of this case.

According to the testimony of Taylor, on the 19th day of June, 1907, he received from the appellants instructions by letter not to ship any more of the lumber till further notice was given. During the remainder of that month, and also during July and August following, some other correspondence passed between him and the appellants with reference to past shipments, but no reference was made to the contract, nor was anything said indicating that appellants did not intend to take the remainder of the lumber purchased. About the 28th of August of the same year, with the consent of the appellants, Taylor sold four carloads of the lumber, aggregating about 80,000 feet, to another party. As he testified, this sale, when added to the amount of lumber delivered, made about 606,000 feet which had been delivered under the contract, leaving about 424,000 feet still undelivered. It was further shown by the testimony of Taylor that on the 28th day of August, 1907, he began selling the lumber which re-

mained of the lot previously sold to the appellants, in carload lots, to the Marshall County Lumber Company, a corporation of which he was manager, with its place of business at Marshall, in Harrison County. He stated that the sales were made with the understanding that the lumber company was to hold the lumber subject to the appellants' orders under their contract with Taylor, should they send in any. But he did not notify appellants of the sales made or of the terms. The lumber thus sold was stored separately by the lumber company in its yards, but how long it was held does not appear. The sales by Taylor to the Marshall County Lumber Company were continued at short intervals down to March 24, 1909, when, according to his testimony, the last of the lumber left on his hands by the appellants had been thus disposed of. He also testified that he mixed with the lumber above referred to 224,000 feet which he had acquired from other sources since his contract with the appellants. The written list, or memorandum, which appellee exhibited as evidence of the sales mentioned above, showed that before this suit was filed Taylor had sold to the Marshall County Lumber Company over 500,000 feet, a part of which was probably some of that subsequently acquired by him. Two months before the case was tried in the court below all of the lumber had been disposed of.

Taylor received no orders from the appellants after June 19, 1907. In January, 1908, or some time prior thereto, he placed his claim against the appellants in the hands of an attorney. On the 23d of January his attorney wrote to the appellants, calling their attention to the fact that there was still a portion of the lumber included in their original purchase that had not been received and paid for by them, and stating that this remainder was held subject to their order, and had been since the 19th of June preceding. Appellants were requested to make some satisfactory arrangement about the handling of this undelivered balence. He also suggested if appellants were not ready to have the remainder shipped that they pay Taylor for it, holding back a reasonable amount to cover the expense of loading and the planer charges; that Taylor would agree to load the lumber out at such times as they might desire it moved. The communication also intimated that, unless some satisfactiry arrangements were made, suit would be instituted to collect the balance claimed. Appellants replied to this on the following day, disclaiming any liability to Taylor for any balance on lumber, claiming that Taylor had failed to comply with the terms of the original agreement in that he had not exercised proper diligence in shipping the lumber out on the orders previously given, and refused to accept or pay for any more of the lumber. On the 11th day of May, 1908, this suit was filed.

All of the controlling facts upon which the issue of venue must rest do not appear to have been submitted in the questions propounded to the jury. But, inasmuch as the merit of the assignment here under consideration must be tested alone by the refusal of the court to give a peremptory instruction to return a verdict in favor of appellants upon that issue, such failure is of no importance, and the findings made by the jury upon the issues that were submitted are immaterial. The question before us is, had Taylor by his conduct waived

or lost the lien which he might have asserted in an action for a foreclosure had he elected the appropriate remedy? We think the evidence conclusively shows that he had. Assuming that the contract was broken by the appellants on the 19th day of June, 1907, or in August following, Taylor must be held to have made an election of his remedy when he began selling the undelivered balance of the lumber to the Marshall County Lumber Company on the 28th of the last mentioned month. The fact that in making the contract of sale with that company he imposed a condition that the lumber be held by it subject to the orders of the appellant, did not relieve him of the effects of having made a transfer of the property to another. In so doing he placed it beyond his power to deliver the lumber when he collects the purchase price by suit, or upon a voluntary tender of payment by the appellants before judgment. It is no answer to say that the lumber company had bound itself to deliver the lumber to him upon demand. That would be substituting the obligation of the lumber company for Taylor's own. This he had no right to do. He did have the right to resell the lumber remaining in his possession and thus reimburse himself as far as this could be done for the purchase price still due him. Such a resale would be wholly inconsistent with a sale reserving the right to the appellants to still secure the lumber under their original contract of purchase. If Taylor made a sale of the lumber as his own, that transaction amounted to a rescission of the contract and a resumption by him of the title, and there could thereafter be no lien subject to a judicial foreclosure. A man can not have a lien on that which he owns in fee. If Taylor had thereby elected the remedy of reselling, he then began asserting a right that did not depend upon or contemplate the judicial foreclosure of a lien. Where this remedy is resorted to by the seller he is not in a proper attitude to appeal to the courts until his resale is complete and he had thereby ascertained his full damages. Counsel for appellee contends that, notwithstanding a part of the lumber had been sold by Taylor before suit was filed, as long as any portion of it remained unsold that portion belonged to the appellants and was subject to Taylor's lien. This contention is, we think, unsound. In cases like the present, where the subject matter of the contract is divisible, such a policy would permit the seller to deal with a part of the property as his own and the remainder as that of the vendee. As before stated, upon a breach of the contract the seller has the right by an election to fix his relations to the property remaining in his possession, but this election must be toward the property as a whole. The seller can not be permitted to select portions which he may claim as his own and treat other portions as still belonging to his vendee, where all are the subject matter of the same contract. Such a rule would not only be an anomaly in civil jurisprudence, but would be productive of confusion in the enforcement of remedies, and would furnish tempting opportunities for sellers to impose upon defaulting purchasers. We think the principles we have announced are much the same as those which support the rule forbidding a party having the option to affirm or rescind a contract, upon breach by another, from affirming in part

and rescinding in part. Nass v. Chadwick, 70 Texas, 157, 7 S. W., 828. The right to resume title to the property remaining in his possession being still in Taylor, he could, upon a breach, through the exercise of his power of election of remedies, devest the appellants of any title which may have theretofore been transferred to them. Hence, when he elected to treat a portion of the lumber as his own, and so dispose of it, that determined his relations to all of it. We have therefore concluded that at the time he filed his suit Taylor had no lien on the property involved, and could not, for the purpose of a foreclosure, invoke the jurisdiction of the District Court of Harrison County.

It is further claimed, as before stated, that the venue can be sustained upon the ground that the appellant agreed in writing to the performance of an obligation in Harrison County. The specific obligation relied upon in the argument is that he was "to receive the lumber in Harrison County." We must look to the terms of the contract as evidenced in the written instrument for guidance in the determination of this question. It is immaterial whether the appellants agreed by some parol provisions of their contract to perform an obligation in Harrison County or not. Unless that obligation is implied or expressed in the written instrument it is unavailable for the purposes of supporting the venue in this instance. An "obligation," as we understand that term, in order to come within the provisions of the statute, must be a contractual agreement to perform some duty or service essential to confer or protect some right which the other party to the contract may claim. In other words, the obligation must be such that, if not performed, its breach would deprive the other party of some appreciable right, or occasion him some actionable damage. In no other sense could the statute be given an intelligent interpretation. Its purpose was to fix the venue of suits, and in using the word "obligation" it clearly contemplated only such obligations as might be made the basis of suits. The written contract in this case does not provide that the price of the lumber shall be paid in Harrison County. The undisputed parol evidence shows that it was not to be paid there. We may then ask, what damage resulted to Taylor by the failure of appellants to send in orders for the remainder of the lumber purchased by them? Under the facts, the delivery and acceptance of the lumber on board the cars was not essential to the perfection of the appellee's right to the purchase price. If we are correct in holding that the title had been transferred by the original contract of sale, the failure to accept only relieved the appellee of the performance of his duty to deliver. The refusal to pay the full contract price was the only material obligation broken. If it be held that the contract was only executory, and that title still remained in the seller, the measure of his damages was in no way affected by the refusal to accept the lumber. The very foundation of an action for damages for the breach of an executory contract is the loss of the benefit which the complaining party might have reaped had the contract been executed in full. We fail to see in the present case how the failure or refusal of the appellants to receive any more lumber affected the right of the appellee to recover the full purchase price, if the contract be regarded

as a completed sale, or full damages for a breach in case it is construed to be only an executory agreement. The writing itself is silent as to where the lumber is to be delivered. The testimony of both Taylor and one of the appellants is to the effect that the terms "f. o. b. cars," when used in such contracts, merely indicates that the purchaser is to pay the freight from the point mentioned.

There are some other errors growing out of the answers of the jury to the questions submitted by the court, some of which are material and others not. But, in view of the disposition we make of the case, we think it unnecessary to notice them, inasmuch as they will probably not occur upon another trial.

The judgment of the court is reversed and the cause remanded, with instructions to transfer the case to the District Court of Dallas County.

Reversed and remanded with instructions.

TEXARKANA & FORT SMITH RAILWAY COMPANY v. STERLING BRANDON.

Decided March 3, 1910.

1.—Master and Servant—Duty to Warn of Danger.

It is the duty of the master to warn his servant of dangers incident to his employment, unless they are such as he has a right to assume that the servant has knowledge of or will acquire knowledge of before he incurs them.

2.—Same—Master's Knowledge.

If the dangers are such as may be said to be obvious to a person of ordinary intelligence, or if they are ordinary ones incident to service the employe has contracted to perform, and so impliedly represented himself as competent to perform, in the absence of anything to show the contrary, the master may assume that the servant will understand and appreciate them, and he need not warn the servant. But where the dangers are not obvious, and where the servant has not contracted to perform the service, the master has no right to assume that the servant will know and appreciate the danger and should act on the assumption that he is ignorant and warn him thereof. Bering Mfg. Co. v. Femelet, 35 Texas Civ. App., 36; Gulf, C. & S. F. Ry. Co. v. Newman, 27 Texas Civ. App., 77; Houston & T. C. Ry Co. v. Strycharski, 35 S. W., 851, distinguished.

3.—Same—Case Stated—Charge.

A negro, who had previously worked only as a section hand or common laborer, having been employed two or three weeks at a railway round house in cleaning up about the round house and foreman's office, was directed by the foreman to get into the pit under an engine and loosen with a wrench a plug in the bottom of the boiler of a locomotive engine for the purpose of draining it. In so doing he was scalded by steam and hot water escaping from the boiler when the plug was loosened. He was ignorant of machinery, of the structure of the engine and the fact that the boiler then contained hot water and of the danger incident to loosening the plug. Held, that an instruction that he could recover under these circumstances if the foreman failed to warn him of the danger was proper without requiring a finding also that the foreman knew he was ignorant thereof.

4.—Same—Pleading.

Plaintiff having alleged that he was injured by steam and hot water

escaping from the boiler on his removing the plug in the bottom of it as directed by the foreman, no variance appeared in the proof that, having loosened and partly taken out the plug, it then blew out by the pressure of steam in the boiler. De La Vergne Refg. Co. v. Stahl, 54 S. W., 40, distinguished.

5.—Same.

Plaintiff having alleged and shown facts entitling him to recover though the work he was performing by direction of his foreman was within the scope of his employment, he was entitled to have the issue of liability on that theory of the case submitted, though he had also alleged that the work was such as he had not been employed to do.

6.—Warning—Servant in Scope of Employment.

Though the servant is performing an act within the scope of his employment, the master setting him at the specific duty is liable for failure to warn him of dangers therein if they are known to the master and he has reason to believe that they are unknown to the servant by reason of his inexperience in the work or ignorance of the circumstances. Facts considered and held to show that the foreman directing plaintiff to perform the work was chargeable with notice of his ignorance of danger and the necessity of warning him.

7.—Assumed Risk—Contributory Negligence.

Evidence considered and held insufficient to raise the issue of assumed risk or that of contributory negligence on the part of the injured servant.

8.—Assumed Risk—Scope of Employment.

A servant who engages in a task outside the scope of his employment and involving greater dangers of which he is ignorant, doing so at the direction of the foreman on account of the absence of the employe charged with that particular duty, does not assume the risk.

9.—Requested Instructions.

It is proper to refuse requested instructions on matters sufficiently covered by the charge given.

10.—Damages.

Evidence considered and held to support a recovery of $1,500 as damages for personal injury to a laborer in a railway round house scalded by hot water from an engine.

Appeal from the District Court of Bowie County. Tried below before Hon. P. A. Turner.

Glass, Estes, King & Burford, for appellant.—Appellant can not be held liable for a failure to instruct or warn appellee unless the jury should find from the evidence that it knew, or had reason to believe, that appellee was inexperienced or was ignorant, and in consequence was in danger of receiving some injury while engaged in the work of washing the boiler. Bering Mfg. Co. v. Femelat, 35 Texas Civ. App., 36; Gulf, C. & S. F. Ry. Co. v. Newman, 27 Texas Civ. App., 77; Houston & T. C. Ry. Co. v. Strycharski, 35 S. W., 851; 1 Labatt's Master and Servant, sec. 241; De La Vergne Ref'g Co. v. Stahl, 54 S. W., 40.

The third paragraph of the charge is erroneous in submitting a theory of the case not made by plaintiff's pleading, and in ignoring the defenses of assumed risk and contributory negligence. Brandon v. Texarkana & Ft. S. Ry. Co., 113 S. W., 968; Gulf, C. & S. F. Ry. Co. v. Anson, 82 S. W., 785; Ratteree v. Galveston, H. & S. A. Ry.

Co., 36 Texas Civ. App., 197; Texas Short Line Ry. Co. v. Patton, 80 S. W., 881; Harwell v. Southern Fur. Co., 75 S. W., 52; Gulf, C. & S. F. Ry. Co. v. Vieno, 7 Texas Civ. App., 347; St. Louis S. W. Ry. Co. of Texas v. Fowler, 93 S. W., 484; Pecos & N. T. Ry. Co. v. Blasengame, 42 Texas Civ. App., 66; Texas Cent. Ry. Co. v. Waldie, 101 S. W., 517.

Hart, Mahaffey & Thomas and *Thomas N. Graham,* for appellee, cited: Brandon v. Texarkana & Ft. S. Ry. Co., 113 S. W., 968, and authorities here cited; Missouri, K. & T. Ry. Co. v. Crane, 13 Texas Civ. App., 426; Missouri, K. & T. Ry. Co. v. Quarles, 22 Texas Civ. App., 83; Hillsboro Oil Co. v. White, 54 S. W., 432; Galveston, H. & S. A. Ry. Co. v. Renz, 24 Texas Civ. App., 335; Galveston, H. & S. A. Ry. Co. v. Hughes, 22 Texas Civ. App., 134; Texas & P. Ry. Co. v. Utley, 27 Texas Civ. App., 472.

WILLSON, CHIEF JUSTICE.—On a former appeal of this case a judgment in favor of the railway company was reversed because the trial court had erred in peremptorily instructing the jury to return the verdict on which it was based (113 S. W., 968). This appeal is from a judgment against the railway company for the sum of $1,500.

Among other allegations, appellee's petition contained the following:

"3. That on about the said 5th day of August, 1906, plaintiff was in the employ of the defendant as a local cinder loader; that is, was engaged in loading cinders on cars in and about the yards of the defendant in the city of Texarkana, Texas, his said employment being that of an ordinary laborer. That one Ed Gilroy was the foreman of this plaintiff, under whose direction and control the plaintiff was then and there working.

"4. That on about the said 5th day of August, while the plaintiff was so employed by the defendant, and working under the control and direction of the said Ed Gilroy, he, the said Ed Gilroy, directed and required plaintiff to engage in other grade and class and kind of employment, to wit, washing boilers of locomotives placed over a pit in defendant's said roundhouse, and the said Ed Gilroy, as vice-principal of the defendant, directed and required plaintiff to remove a plug from the bottom of a locomotive engine boiler then standing upon defendant's tracks over said pit in said roundhouse; that acting under the directions and requirements of the said Gilroy plaintiff, not knowing the danger incident thereto, went under said locomotive engine and removed said plug from the said boiler, whereupon a large amount of hot water and steam was suddenly and without warning discharged from the said boiler on and upon the person of the plaintiff, scalding him upon his feet, legs, side, back, groins, arms, hands, and, in fact, almost his entire body, and inflicting upon him divers and sundry burns, scalds and injuries. That the said engine and boiler was defective, in that it had no blowoff cock by means of which the hot water and steam could be released and discharged from said boiler by means of the removal of the said plug without the person removing the same going into said pit and under said boiler; that

to go under said engine and remove said plug was dangerous, but that such danger was wholly unknown to the plaintiff, and defendant's said vice-principal, Ed Gilroy, well knew that the plaintiff did not know the danger thereof, and the said Ed Gilroy did then and there, fully understanding and knowing the danger incident to the going into said pit and removing said plug, and without warning to plaintiff, as aforesaid, he furnished plaintiff with a short wrench, and directed him to go into said pit and remove said plug.

"5. That said work of removing said plug from said boiler was skilled labor, and, in order to safely do same, it required a man skilled in such work, and one with knowledge of the construction of said boiler, and one with knowledge of how to remove said plug without permitting the water and steam in said boiler to be discharged on and upon him, which was unknown to plaintiff, but was well known to the defendant. The plaintiff is not, and was not, skilled in such work, and possessed no knowledge of the construction of said boiler, and possessed no knowledge of how to safely remove said plug, and how to avoid being scalded by the hot water and steam which would escape from said boiler upon the removal of said plug, all of which was well known to the said Ed Gilroy at the time he directed and required the plaintiff to go under said boiler and remove said plug. The plaintiff had no knowledge that said engine was defective, in that it had no blowoff cock by means of which the steam and hot water could be released and discharged from said boiler without going under said engine; that the defendant well knew that said engine was defective because it had no such blowoff cock, and failed and neglected to inform plaintiff thereof.

"6. The defendant was negligent in causing the injuries hereinbefore mentioned to be inflicted upon this plaintiff, in the following respects and in the following manner: First. In failing to have said engine equipped with a blowoff cock, so that steam and hot water might have been released and discharged from said boiler without entering said pit and going under said boiler and removing said plug with a wrench. Second. In requiring and directing plaintiff to go under said boiler and remove said plug, defendant knowing the danger incident thereto, and knowing of plaintiff's want of knowledge of such danger, and in failing to advise plaintiff of the danger, and failing to advise plaintiff of the increased danger by reason of the absence of a blowoff cock, and in failing to direct him how to safely do such work. Third. In requiring plaintiff to go under said boiler and remove said plug, knowing that it required a skilled person to safely do so, and knowing plaintiff to be unskilled, and knowing that the plaintiff did not know it required a skilled person to safely do the work, and knowing that the plaintiff was unacquainted with the construction of said boiler, and knowing plaintiff's want of knowledge of how to safely remove said plug, and knowing that the plaintiff was not aware of the danger incident to unskilled persons attempting to remove said plug."

The charge of the court, in part, was as follows:

"2d paragraph. If you believe from the evidence that defendant, by Gilroy, ordered plaintiff to help wash out one of its boilers, sta-

tioned over its pit in its roundhouse, and that Gilroy ordered him to get in said pit and loosen one of the plugs in said boiler, and that this was work outside of his employment, and which he had not contracted to do in his employment, and that in pursuance of such order he got in the pit and loosened said plug, and while so engaged, and while in the pit, the plug blew out, or was forced out, and hot water rushed and scalded him, and that this was dangerous work when done by an inexperienced person, and that defendant did not warn plaintiff of the particular danger incident to doing said work and how to do it with safety to himself, and that plaintiff was inexperienced in said work and was ignorant of the danger incident to doing it, and that the danger, if any, in doing the work was not obvious to a person of ordinary intelligence, and that such failure on the part of defendant to warn plaintiff caused him to be injured while standing in the pit, loosening said plug in said boiler, then you will find for plaintiff. However, in this connection I charge you that, if you believe from the evidence that plaintiff knew of the danger of getting in the pit and remaining there while loosening the plug in said engine, or if you believe from all the evidence in this case that the danger was obvious and apparent to any person of ordinary intelligence; or if you believe from the evidence that plaintiff was warned of the particular danger incident to getting in the pit and loosening said plug, and remaining there, and how to do this work in order to avoid injury to himself, then you will find for defendant.

"3d paragraph. If you believe from the evidence that defendant ordered plaintiff to help wash out one of its boilers, stationed over its pit in its roundhouse, and that he was ordered to get in the pit and loosen one of the plugs in said boiler, and that in pursuance of such order plaintiff got in the pit and loosened said plug in said boiler, and that while so engaged, and while in said pit, said plug blew out, or was forced out, and hot water rushed out of said boiler and scalded him, and that getting in said pit and loosening said plug was dangerous work when done by an inexperienced person, or by one ignorant of such danger, and that this work was in the scope of his employment and was work he had contracted with defendant to do, taking into consideration all the evidence in this case, and that plaintiff was inexperienced in such work and was ignorant of the danger in getting in the pit and loosening the plug and remaining therein, and that defendant knew that said work was dangerous and knew of plaintiff's inexperience and ignorance, or should have known it, from all the evidence in this case, and that defendant failed to warn plaintiff of the particular danger incident to getting into the pit and loosening said plug and remaining therein, and how to do this with safety to himself, and that by reason of such failure the plaintiff was injured, then you will find for the plaintiff. However, in this connection I charge you that, if you believe from the evidence that plaintiff knew of the danger of getting in the pit and loosening the plug and remaining therein, then you will find for defendant; or if you believe from the evidence that defendant did not know of the ignorance of plaintiff and of his inexperience, if such, or that, from all the evidence in this case,

he could not have reasonably known of his ignorance and inexperience, then you will find for defendant.

"4th paragraph. If you believe from the evidence that plaintiff got in the pit to loosen one of the plugs of said boiler, and that while so engaged, and while in the pit, and before he was injured, he was warned of his danger in time to save himself from harm, and that he heard such warning but did not heed the same, but continued to remain in said pit and continued to loosen or unscrew said plug till the hot water gushed out of said engine and scalded him, then you will find for the defendant."

From the testimony on the trial it appeared that in August, 1906, when appellee was injured, appellant had between the rails of a track at its roundhouse in Texarkana a pit about two feet deep, two and one-half feet wide and forty or fifty feet long, used in washing boilers of locomotive engines. One Gilroy, as appellant's master mechanic, was in charge of its roundhouse, and had authority to employ and discharge men performing service there. Appellee, a negro, had worked on a farm, around railroad depots, handling freight, baggage and mail, as a section hand on railroads, and at appellant's cinder pit, where he shoveled cinders on to cars set to be loaded with them. Two or three weeks before the time he suffered the injuries he complained of appellee was transferred by Gilroy from work at the cinder pit to the roundhouse. "I had taken him," Gilroy testified, "into the roundhouse as a kind of roustabout, to clean up my office and clean up about the roundhouse." Boiler washing was an occupation requiring experience and skill, and was dangerous when undertaken by an inexperienced and unskilled person. Appellee knew nothing about the construction of engines or boilers, nor anything about machinery. Gilroy knew he had had no experience as a machinist, and knew that only a short time before he was injured appellee had engaged in work as a section hand, and later in shoveling cinders. On an occasion when cold water was running through it appellee, with a wire, had scratched scales out of a boiler, but otherwise had had no experience in washing boilers. Gilroy knew this. On the occasion when he was injured, an employe who had generally assisted in washing boilers being absent, Gilroy directed appellee to wash, or assist one Hudson in washing, the boiler to a locomotive placed over the pit referred to, and preparatory to doing so to go into the pit under the boiler and remove therefrom a plug, for the purpose of providing a way for water in the boiler to escape. The boiler at the time, as Gilroy knew, contained hot water and steam. As to whether appellee also knew it contained hot water or steam was disputed, but the testimony was sufficient to support a finding that he did not know it. In compliance with Gilroy's instructions, appellee went into the pit, and, using a wrench furnished to him by Gilroy for the purpose, undertook to unscrew and remove the plug. The plug was threaded, and had been made to fill a threaded opening one and a half or two inches in diameter in the boiler. The plug was tapering in shape, and the opening in the boiler had been made to conform to it, so that, as one of the witnesses testified, referring to like plugs, "the further in they screw them the tighter they get, and the further out you screw them

the looser they get." Gilroy was present during a part of the time while appellee was endeavoring from his position in the pit under the boiler to loosen and remove the plug. Gilroy knew, as he testified, that if appellee got the plug half way out "it was liable to blow out and hurt him." "I knew of that danger," he further testified, "and I did put him down in the pit to do that work. I just gave him an S-wrench and told him to go down there and loosen one of those plugs." As to whether appellee was warned of the danger he was incurring in attempting, as he did, to remove the plug, was a disputed issue. The evidence was amply sufficient to support the finding of the jury that he was not warned and was ignorant of the danger. As to the accident resulting in the injury he suffered and the circumstances accompanying it, appellee testified as follows: "As to how I came to be under this boiler, Mr. Gilroy told us to go down under there. We first started to take out the plug to let the water out. Mr. Gilroy told us after he came down that morning to wash the boiler. The boiler was at that time in the roundhouse. As well as I can remember it was in the roundhouse. When I first went to the boiler Del Hudson was with me. Big Boy worked nights. There was another fellow named Shorty who should have been with Del Hudson. He was working with him. We called him Shorty. I don't know his name. He was off that Sunday on some kind of cause, I don't know what. He was the man that was working with Del Hudson, but was not there that morning, and Mr. Linam had me to help Del that morning. Mr. Gilroy hadn't come down there. I was helping Del when Mr. Gilroy come down there, and he had me to help him wash the boiler. Mr. Linam was the hostler at that time. We first tried to let the hot water out of the boiler, and there was no blowoff cock to let it off, or we could not work the blowoff cock on it. We then tried to take out a plug on the side, and couldn't do it, and we told Mr. Gilroy that we couldn't get any plug out on the side. I told Mr. Gilroy that. I went to Mr. Gilroy. He was at that time at the office. Mr. Gilroy then told me to go down in the pit and see if I could not get one out. Del was at that time around there somewhere, looking for a wrench. Mr. Gilroy gave me an S-wrench—a little wrench about twelve inches long. I did not know that that boiler was filled with hot water at that time. I knew there was water in it, but I did not know it was hot water. When I went back there to the engine with that wrench I tried to get a plug out. I went down in the pit like Mr. Gilroy told me. I had a hammer and beat on it, and finally I kept wrenching on it and it got loose, and I made another little turn on it and it blew out. I did not know how those plugs were made. I never had taken one out. It shot out all at once."

After stating the case as above.—The second paragraph of the trial court's charge submitted the case to the jury on the theory that appellee might have been injured while performing, in accordance with Gilroy's instructions, a service outside the scope of his employment. It is attacked as erroneous because, under circumstances stated in that part of the charge, it authorized the jury to find in appellee's favor,

if they believed Gilroy failed to warn him of the danger to be incurred in removing the plug as directed, without respect to whether Gilroy knew he was ignorant of that danger or not. In support of its contention appellant refers us to Bering Mfg. Co. v. Femelat, 35 Texas Civ. App., 36, 79 S. W., 869; Gulf, C. & S. F. Ry. Co. v. Newman, 27 Texas Civ. App., 77, 64 S. W., 790; Houston & T. C. Ry. Co. v. Strycharski, 35 S. W., 851. In the Femelat case the plaintiff had been employed during forty days as a helper assisting another employe engaged in operating a circular saw placed under a table or platform. In removing with his hand sawdust collected under the table plaintiff's hand came in contact with and was injured by the saw. He testified he had been directed by the foreman to remove the sawdust. He further testified that he knew it was dangerous "to monkey with" the saw—that "the smallest child would know it was dangerous to put their hand on it." That the plaintiff may have suffered the injuries he complained of in performing, by direction of his superior, a service outside the scope of his employment, does not appear to have been an issue in the case. It seems to have been a case where the plaintiff sought a recovery on the theory that the master had negligently failed to warn him of a danger incident to work he had contracted to perform. The court properly, we think, held that a failure on the part of the foreman, under those circumstances, to warn plaintiff of the danger to be incurred in working around the saw, and to instruct him how safely to remove the sawdust, was not negligence *per se*. In the Newman case, plaintiff had been employed to fire boilers to an engine. In obedience to his foreman's instructions he undertook to operate the engine and was injured. The court said: "Hombert, who was the foreman in charge of the engine-room, and who placed plaintiff in charge of the engine, knew plaintiff was inexperienced in its operation and ignorant of the dangers. Such being the case, he should have warned plaintiff of the danger. The operating of the engine was outside plaintiff's regular employment and was more hazardous. In such case the servant does not assume the risk." In the Strycharski case the plaintiff had been changed from his occupation of cleaning stationary cars on tracks under sheds and put to work filling water tanks, etc., of cars in incoming and outgoing trains. The tanks were filled from the tops of the cars, and he used a ladder placed against a car in getting to the top thereof. While he was on the ladder filling a tank of a car, another car was caused to collide with it and he was thrown to the ground and injured. The court said: "His (plaintiff's) own evidence, and that of his superior, Bloxsom, who had the power to employ and discharge such servants, and was the representative of the company, show that his previous experience was not sufficient to qualify him, without further instructions, for the new work, and that in his new situation there were risks which were not incident to his old, against which ordinary care for his safety required warning from the superior." The court further said: "In view of the verdict of the jury (for the plaintiff), we conclude that by the change in the method of handling the cars on the night in question plaintiff was exposed to a danger of which he was ignorant, and which his experience did not enable him to foresee,

and that Bloxsom knew, or by ordinary care could have known it, and that such care would have required him to notify plaintiff of such danger, and that, in omitting to do so, he was guilty of negligence which helped to cause plaintiff's injury." It is apparent, we think, that the cases mentioned do not support appellant's contention, but that, on the contrary, the Newman and Strycharski cases, so far as they can be said to be applicable, rather tend to support an opposite view of the question. As we understand the law, it is the duty of the master to warn his servant of dangers incident to his employment, unless they are such as he has a right to assume that the servant has knowledge of or will acquire knowledge of before he incurs them. If the dangers are such as may be said to be obvious to a person of ordinary intelligence, or if they are ordinary ones incident to service the appellee has contracted to perform, and so impliedly represented himself as competent to perform, in the absence of anything tending to show the contrary, the master may assume that the servant will understand and appreciate them, and he need not warn the servant. But where the dangers are not obvious, and where the servant has not contracted to perform the service, we understand the law to be that the master has no right to assume that the servant will know and appreciate the dangers, and that it becomes his duty to act upon an assumption that the servant is ignorant of the dangers, and, therefore, to warn him thereof. 1 Labatt's Master and Servant, secs. 460, 240, 270; 4 Thompson on Neg., secs. 4065, 4102, 4079; Mather v. Billston, 156 U. S., 397, 39 Law ed., 469; International & G. N. Ry. Co. v. Gaitanes, 70 S. W., 101; Bonnet v. Galveston, H. & S. A. Ry. Co., 89 Texas, 72, 33 S. W., 335; Texas & P. Ry. Co. v. Utley, 27 Texas Civ. App., 472, 66 S. W., 311; Tennessee C. I. & R. Co. v. Jarrett, 82 S. W., 227; Consolidated Coal Co. v. Wombacher, 24 N. E., 629; Alabama Steel & Wire Co. v. Wrenn, 34 So., 974; Ft. Worth & D. C. Ry. Co. v. Wrenn, 20 Texas Civ. App., 628, 50 S. W., 210. "Investigation of cases of this class—that is, where the servant is injured in the performance of service outside the scope of his employment"—said Mr. Labatt, "must always start from the hypothesis that these risks are prima facie unknown to the servant, and the fact of his knowledge must be established by positive proof." 1 Labatt on Master and Servant, sec. 460. If such risks should be regarded as prima facie unknown to the servant, then the master has no right to assume he knows of them. If the master can not assume that the servant knows of them, the risks being such as the servant has not assumed, the duty of warning him of same rests upon the master; and, if he fails to perform the duty, he should be held liable to the servant for an injury proximately caused by his neglect. So, in the case before us, if washing boilers was not a duty appellee had contracted to perform, if the risk he incurred in attempting to remove the plug as directed by Gilroy, preparatory to washing the boiler, was not an obvious one, as we think it was not, if Gilroy had not warned him of the danger to be incurred, and if he was, in fact, excusably ignorant thereof, as the testimony showed he was, and if as a result, proximately, of Gilroy's failure to warn him, he suffered injuries as complained of, we think appellant was liable, without reference to

whether Gilroy knew or did not know that appellee was, in fact, ignorant of the danger he incurred in undertaking the service. Therefore we are of the opinion that the charge upon the ground urged was not erroneous.

Nor do we think said portion of the court's charge was erroneous because it authorized the jury to find for appellee if they believed that the plug blew out or was forced out, the allegation in the petition being that appellee removed it. The plug blew out or was forced out while appellee was engaged in the act of removing it, and we think the allegation that he removed it, in view of the evidence, authorized the instruction to find for appellee if it blew out or was forced out. In De La Vergne Refrig. Mach. Co. v. Stahl, 54 S. W., 40, cited by appellant as supporting the contention it makes in this particular, the plaintiff had alleged that he was injured by a piece of iron chipping off from a hammer furnished to him by the master and striking him in the eye. He further alleged that the hammer was defective in that it was old, cracked, etc. The evidence tended to show that the hammer was a new one, was not cracked, etc., and that the piece chipped off from it because it had been too highly chilled or tempered. On the ground that plaintiff could recover only on proof of the negligence particularly alleged, the court held to be error a refusal of the trial court to give a requested charge instructing the jury to find for the defendant if they believed the injury was not caused by the hammer being old and cracked, but by a hammer too highly tempered or made of inferior material. In the case before us the negligence alleged was not the blowing or forcing out, or removal of the plug, but the failure of Gilroy to warn appellee of the danger he incurred in endeavoring to remove it.

The third paragraph of the court's charge submitted the case to the jury on the theory that removing the plug was a duty within the scope of appellee's employment, and therefore one he had undertaken by his contract of employment to perform. It is attacked as erroneous on several grounds. We do not think the contention made, that such a theory of the case was without support in the pleadings, should be sustained. Appellee alleged fully the facts of his case, specifically averring that Gilroy knew it was dangerous for a person ignorant of the construction of a boiler and unskilled in removing such plugs therefrom to undertake as appellee did to comply with his (Gilroy's) instructions, and further specifically averring that said Gilroy, at the time he directed him to do the work, knew he was ignorant of the construction of a boiler, knew he did not know how safely to remove the plug therefrom, knew he did not appreciate the danger he would incur in attempting to remove said plug, and nevertheless failed to warn him of that danger. That appellee also alleged that the work was outside the scope of his employment, we think, furnishes no reason for saying that his pleading was insufficient to support a finding that appellant was negligent in failing to warn him of dangers incident to work within the scope of his employment of the existence of which it knew he was ignorant.

Nor, in the case as made by the record, do we think the contention made, that said portion of the charge was erroneous, because, under

circumstances therein stated, it authorized a recovery by appellee, notwithstanding the duty to remove the plug was one within the scope of the duties of his employment, if appellant did not know, yet should have known, that appellee was ignorant of the danger he incurred in complying with Gilroy's instructions. If Gilroy did not know, yet should have known, that appellee was ignorant of the danger when, without warning him of that danger, he directed appellee to do the work, we think appellant was liable. If washing boilers was a service appellee contracted to perform appellant had a right to assume that appellee was competent to wash them, and, in the absence of circumstances tending to show he did not apprehend the dangers to be incurred, did not owe him the duty to warn him as to ordinary risks incident to such service. But if the circumstances were such that Gilroy should have known that appellee, on account of his ignorance or lack of experience, in obeying his command would incur a danger he did not appreciate, it was Gilroy's duty to warn him of the danger. The law was thus stated by Judge Lurton in Felton v. Girardy, 104 Fed., 130: "If the employment be one of a dangerous character, requiring skill and caution for its proper discharge with safety to the servant, and the master be aware of the dangers, and have reason to know that the servant is unaware of them, and that from his youthfulness, feebleness, incapacity or inexperience, does not appreciate them, the servant can not, even with his own consent, be exposed to such dangers, unless he be cautioned and instructed sufficiently to enable him to comprehend them, and, with proper care on his own part, do the work safely." In Louisville & N. Ry. Co. v. Miller, 104 Fed., 126, the same judge, in stating the rule, said: "It is illogical to say that a servant impliedly assumes the hazards and risks of an occupation which are known to the master, but which the master knows are unknown to the servant, unless the dangers are so obvious that even an inexperienced man could not fail to escape them by the exercise of ordinary care. The law is well settled that the duty of cautioning and qualifying an inexperienced servant in a dangerous occupation applies as well to one whose disqualification arises from a want of that degree of experience requisite to the cautious and skillful discharge of the duties incident to a dangerous occupation with safety to the operator, as when the disqualification is due to youthfulness, feebleness or general incapacity. If the master has notice of the dangers likely to be encountered, and notice that the servant is inexperienced, or for any other reason disqualified, he comes under an obligation to use reasonable care in cautioning and instructing such servant in respect to the dangers he will encounter and how best to discharge his duty." And see Michael v. Roanoke Machine Works, 19 S. E., 263. Gilroy knew that the boiler was full of hot water and steam, and that the service he directed appellee to perform was a dangerous one. Appellee did not know the service to be dangerous. We are inclined to think the testimony should be regarded as establishing not only that Gilroy should have known, but conclusively that he did know, that appellee, because of his inexperience, was ignorant of and did not appreciate the danger involved in undertaking to remove the plug. Gilroy knew that appellee had been working as a section hand, and

then shoveling cinders, before he transferred him to work at the roundhouse; that appellee had no experience as a machinist; that he was a "new man so far as roundhouse work went;" and that he had never assisted in washing more than one boiler, and that when he assisted in washing that one it had cold water running through it. Gilroy, if he did not know, was chargeable with knowledge of the peculiar shape of the plug he directed appellee to remove; he knew that its shape could not be determined from an inspection of its exposed part; and he knew that, because of its shape when unscrewed about one-half its length it would blow out or come out of the opening it was made to fill, and would permit hot water and steam from the boiler to escape into the pit. He had no reason to believe appellee knew or had ever had an opportunity to know anything about the shape of the plug, and therefore that he knew or would appreciate in the least the danger to be incurred because of its shape, in removing it as he had been directed to remove it. If, therefore, we were of the opinion that the charge of the court on the ground urged was erroneous, we would be inclined to hold, on the ground that the evidence indisputably showed that Gilroy knew appellee was ignorant of the danger, that the error was a harmless one.

The third paragraph of the charge is further attacked on the ground that, while it authorized the jury to find in appellant's favor if they believed appellee appreciated the danger he incurred in attempting to remove the plug, or if they believed that it did not know and reasonably could not have known of appellee's ignorance and inexperience, it did not authorize them to consider its defenses of assumed risk and contributory negligence on the part of appellee. If it was not clear from the evidence that appellee was wholly ignorant of any danger to be incurred in washing the boiler, it was clear that he did not apprehend the danger he incurred on account of the peculiar shape of the plug, and that he was excusable for not apprehending it. Therefore, we think an issue as to whether he had assumed that risk or not was not made by the evidence. Nor do we think the testimony raised an issue as to contributory negligence on his part. At the time he was injured he was engaged in doing what Gilroy had instructed him to do, in the manner Gilroy had directed him to do it. Bering Mfg. Co. v. Femelat, 35 Texas Civ. App., 36, 79 S. W., 873; Helm v. O'Rourke, 15 So., 402. The danger he thereby incurred not being an obvious one, he had a right to assume that Gilroy's knowledge was superior to his own, and it should not lie in appellant's mouth to say that, because he complied with its foreman's instructions, he was guilty of negligence.

There is, however, another reason why we think the assignments attacking said third paragraph of the court's charge on the grounds stated should be overruled. The service appellee attempted, in compliance with Gilroy's instructions, to perform, was outside the scope of his employment. He had been transferred by Gilroy from the cinder pit to the roundhouse to clean up his (Gilroy's) office and about the roundhouse—to serve as a "kind of roustabout." In other words, to do work involving no risk, and requiring, to do it safely, neither experience nor skill. Evidently neither Gilroy nor appellee contemplated

that the latter should wash boilers. That kind of work involved danger to the person undertaking it, and required experience and skill. Appellee possessed neither, and Gilroy knew it. Moreover, appellant had other men employed to do that work. That appellee was called upon to assist in the work was due to the fact that another employe charged with the performance of such service was absent on the occasion when appellee was injured, and not to the fact that it was a service within the scope of the duties he had been employed to discharge. The service clearly being one outside the scope of appellee's duties, the court need not have submitted the case to the jury on the theory that they might believe the service to have been one he had contracted to perform. To submit it on such a theory, we are inclined to think, was error, but not an error of which appellant has a right to complain. The error in the instruction was that it submitted to the jury a view of the case not authorized by evidence, and on such a view authorized them, if they believed appellant did not know and reasonably could not have known that appellee was ignorant of the danger Gilroy sent him into, to find in its favor; whereas, the danger being one appellant was bound to assume appellee was ignorant of, and appellee being, in fact, ignorant of it, appellant was liable if it did not warn him of the danger, without reference to whether it knew or could have known he was ignorant of it or not.

The assignments complaining of the action of the court in refusing to give to the jury, as requested, special charges numbered 1, 2, 3 and 4, are overruled. The matter presented by those charges, so far as applicable to the case, we think was sufficiently presented in the main charge.

By its thirteenth assignment appellant attacks the verdict of the jury as excessive. We do not think it is. On the contrary, we think the evidence amply sufficient to support the sum found in appellee's favor. He was earning $45 per month, was rendered unable to work during about four months, and incurred expense for medicines and physician's services amounting to $20. As to his injuries, he described them as follows, and he was not in any particular contradicted: "As to what happened to me when that blew out: Why, hot water and mud blew all over me on this side—both legs—scalded me from the collar bone clean down to the ankle on this side, and scalded this leg. Hot water and mud flew in my face; couldn't see out of this eye. It seemed like the hot mud blew all in my face and caught this side as I come out. It scalded me so that I was down about three months before ever I could do anything. I don't know what I did when I first got out of the pit. I was crazy. I don't know where I went. They got a hack or something and carried me home. From there I was carried to the depot and put on the train and went to the hospital at Kansas City. I didn't stay there long—about three or four days. They don't allow any colored people there, and shipped me back down to Shreveport. I stayed there. I suffered pain. I liked to died with my arm. When I got back to Shreveport my arm and leg was swelled up so they couldn't get the cloth off hardly; when they took the cloth off the flesh and all come off. It hadn't been dressed until I got to Shreveport. When they took it off the

meat and all come off; I was lying on one of those chairs, and when they turned the water on it peeled off; I could see the bone, mighty nigh—at this place I guess I could. I suffered from that two months before I could get any peace at all. I was in bed about thirty days. I was in bed all the time after I got to Shreveport. They wouldn't allow me to get out of bed—kept me in—on account of they wanted it to heal if it would. I couldn't do any work to amount to anything for four months. I tried to work a little in three months' time. I still suffer with this arm. I can't use this arm at times at all, and I can't tote anything on this shoulder. It deadened this whole arm, all the way up. If I put my shoulder against anything, this arm looks like pins were sticking in it or something."

The assignments not in effect disposed of by what has been said are believed to be without merit, and are overruled.

The judgment is affirmed.

Affirmed.

Writ of error refused.

CITY OF PARIS v. MRS. H. L. BRENNEMAN.

Decided March 3, 1910.

1.—Street Improvements—Assessment of Benefits.

The special charter of the city of Paris, the ordinances passed thereunder prescribing the method of procedure for paving streets and assessing the benefits of the improvements against owners of lots thereon, and resolutions and proceedings of the city council for such assessment considered and held to show proceedings in accordance with such charter and ordinances.

2.—Same—Amendment of Resolution.

A resolution providing for the paving of a portion of a street, which complied with all requirements of the charter and ordinances of the city in regard to the method of doing such work and assessing the benefits against lot owners, having been amended by a resolution adding other parts of the street to the portion to be paved this was a sufficient adoption, as to the added part, of the procedure provided by the original resolution.

3.—Same—Engineer's Report.

The ordinances requiring an engineer's report to the council of the cost of improvements and property and owners to be benefited, with estimate of benefits, and the resolution for paving a certain part of a street requiring the making of such report, an amendment to the ordinance added a further portion of the street to the part to be paved under such resolution and a report of the engineer giving the cost, specifications, ownership, and estimated benefits, as to this added portion was made to the council. The requirement that this was to be ordered and made was complied with as to such portion added by the amendment, the failure to order the report before it was made being a harmless irregularity.

4.—Street Paving—Assessment of Benefits—Constitutional Law.

A city charter giving authority to pave streets and assess the cost against lots and lot owners as far as the property is benefited by the improvement, giving such owners the right to be heard thereon before the council but making its determination final, is not unconstitutional as a taking of property without due process of law (Const. U. S. Fourteenth Amendment); nor because jury trial was denied (Const. of Texas, art. 1, sec. 15), the assessment being a tax which was not required to be imposed by a jury; nor under the requirement that private property shall not be taken for public use without

compensation (Const. of Texas, art. 1, sec. 17); nor because such procedure departs from the due course of the law of the land (Const. of Texas, art. 1, sec. 19); nor as infringing the requirement that the courts shall be open for redress of injuries (Const. of Texas, art. 1, sec. 15); nor the requirement that all taxes shall be equal and uniform (Const. of Texas, art. 8, sec. 1) this having no reference to assessment of benefits.

Appeal from the County Court of Lamar County. Tried below before Hon. Leslie Hardison.

Edgar Wright, for appellant.—The procedure did not transgress the Fourteenth Amendment. 28 Cyc., 1103; Norwood v. Baker, 172 U. S., 269; Hutcheson v. Storrie, 92 Texas, 685; French v. Barber Asphalt Co., 181 U. S., 323; Detroit v. Parker, 181 U. S., 399; Schaefer v. Werling, 188 U. S., 515; Cass Farm Co. v. Detroit, 181 U. S., 396; Hibben v. Smith, 191 U. S., 310.

They are not in violation of sections 15, 17 and 19 of the Constitution of Texas. 24 Cyc., 133; City of Austin v. Nalle, 102 Texas, 536; Norris v. Waco, 57 Texas, 635; Buffalo Bayou Ry. Co. v. Ferris, 26 Texas, 588; Werner v. City of Galveston, 72 Texas, 22; Davidson v. New Orleans, 96 U. S., 97; Roundtree v. Galveston, 42 Texas, 626; Taylor v. Boyd, 63 Texas, 533; Allen v. Galveston, 51 Texas, 302.

It is not necessary to comply with the provisions of a general improvement ordinance of a municipality, the said provisions not being expressly named in the charter or constitution as conditions precedent to the exercise of the power; but all were complied with. Ex parte Mayor and City of Albany, 23 Wend., 277; People ex rel. Brownell v. Board of Assessors, 109 N. Y. Supp., 991; City of Jackson v. Williams, 46 So., 551; Hardwick v. City of Independence, 114 N. W., 14; City of Springfield v. Weaver, 37 S. W., 509; City of Galveston v. Heard, 54 Texas, 439; Bordages v. Higgins, 20 S. W., 184; Hutcheson v. Storrie, 92 Texas, 685; City of Waco v. Chamberlain, 92 Texas, 207.

W. F. Moore, Moore & Park and *Burdette & Connor,* for appellee.—On effect of the amended resolution: Frosh v. City of Galveston, 73 Texas, 401; Ardrey v. City of Dallas, 13 Texas Civ. App., 442; Alford v. City of Dallas, 35 S. W., 817; Wood v. City of Galveston, 76 Texas, 126; City of Waco v. Prather, 35 S. W., 958; City of Waco v. Prather, 90 Texas, 80; 28 Cyc., 985, 992 and 1196; City of El Paso v. Mundy, 85 Texas, 316.

On constitutionality of charter and ordinance, Constitution of U. S., 14th Amendment, art. 1; Const. of Texas, art. 1, secs. 15, 17, 19, art. 8, sec. 1; Norwood v. Baker, 172 U. S., 269; Hutcheson v. Storrie, 92 Texas, 685; City of Dallas v. Myers, 55 S. W., 742; Rhine v. McKinney, 53 Texas, 359; Higgins v. Bordages, 88 Texas, 458.

LEVY, ASSOCIATE JUSTICE.—The action was brought by appellant to recover the amount assessed personally against appellee as her proportionate part of the cost of paving a portion of South Main Street in front of and abutting the premises owned by appellee. A general

demurrer was sustained to the petition. The charter of the city specially confers the power upon the city council to make the improvements in suit, when in its judgment it is in the interest of the public to do so, and to assess so much of the cost as may be deemed just and proper against the property specially benefited thereby, and against the owner personally; provided, that the cost or part of the cost specially assessed against any property or property owner shall not exceed the amount of the special benefit in enhanced value which said property shall receive from such improvements. The charter further provides: "The city council shall have full power, by ordinance or resolution, to prescribe such methods of procedure and such general or special rules and regulations as may be deemed just and proper to fully execute and enforce the purposes of provisions of sections 135 to 148 of this Act." In pursuance of this last section the city council properly passed the following ordinance:

"Be it ordained by the city council of the city of Paris:

"Section 1. Whenever the city council deems it to the interest of the city that any street, alley or other public grounds of the city or any portion of either, be paved or repaved and a proportion of the cost of the proposed paving or repaving be assessed against the abutting property and the owners thereof, it shall pass a resolution to that effect, which resolution shall designate the street, alley or other public grounds of the city, or the particular portion of either desired to be paved or repaved, and the general character and nature of the pavement, and direct the city engineer to submit a written report to the council at its next regular meeting or special meeting of the estimated cost of the proposed improvement, accompanied by complete plans and specifications for said improvement and a list of the names of all persons, corporations or associations owning property abutting on said street, alley or public grounds, or portion of either desired to be paved or repaved, and opposite each name on the list the respective dimensions of the property owned by each person, corporation or association, and also the estimated cost of the proposed improvement in front of each piece of abutting property in proportion to its frontage on said street, alley or public grounds to be improved.

"Section 2. It shall be the duty of the city engineer to prepare the report called for in the preceding section and file the same at the next session of the council held after the passage of the resolution ordering the report. Upon the receipt of the report of the city engineer, it shall be referred to a committee of the council, who shall consider the same and report to the council at its next session, stating therein such changes in the manner of constructing said proposed improvement and in the material to be used in same as said committee may deem necessary. Thereupon the council may adopt or reject the report of said committee, and, if said report is adopted, so amend the original resolution, plans and specifications for said proposed improvement as may be necessary. If the original resolution is not amended, or if it is amended in accordance with the report of the committee, and the council is still desirous of making said proposed improvement, it shall instruct the city secretary to cause notice to be published in the official paper of the city of Paris for ten successive days, which

notice shall state that a resolution was introduced and was passed by the city council on the .... day of ....., 190...., ordering the city engineer to prepare plans and specifications for the paving or repaving of the street, alley or other public grounds, or portion of either desired to be improved; the general nature and character of the improvements contemplated, the total cost of the same, as estimated by the city engineer, the name of each owner of property abutting on said street, and refer to the plans and specifications on file to ascertain the dimensions of his property and the estimated cost to him of said proposed improvement, which is to be one-third (1/3) of the costs of the improvement in front of his property; the said notice shall also state the estimated total cost to the city of making said improvement, and notify the owners of the property abutting on said proposed improvements to appear before the city council at .... o'clock on the .... day of ....., 190...., to present objections to said proposed improvement and to introduce testimony to show that the estimated cost of the improvement in front of their property exceeds the benefit to the property, and such other objections as they may have to the making of said improvement, and any and all claims for exemption that said parties may claim by reason of the property being the homestead, or otherwise.

"Section 3. The council shall consider the objections filed and hear testimony in support of and against same at such times as it may designate, after giving notice of the time and place of hearing, to the party filing same. The decision of the council shall be final, and there shall be no appeal from same. Any owner of property abutting on the proposed improvement failing to present and file his objections and claims of exemption at the time and in the manner provided in this ordinance shall be estopped from raising such objections or claiming the exemption. If, after hearing the testimony in support of any objections filed, the council shall be of the opinion that the estimated cost of the proposed improvement exceeds the benefit to the property, it shall fix the amount to be charged against said property at a sum equal to the benefit to the property, and thereafter assess said amount against same.

"Section 4. If after due consideration of all of the objections filed as provided in preceding sections, the city council is still of the opinion that said improvement shall be made, it shall direct the mayor to advertise for bids for the construction of said proposed improvement in accordance with the plans and specifications prepared by the city engineer, and upon the receipt of a satisfactory bid the council shall pass an ordinance ordering the construction of said proposed improvements and assessing against the owners of the abutting property their respective proportions of the cost of same, and providing the manner and terms of the payment of said assessments and the collection of same, and also appropriating the amount necessary to pay the proportion of the cost of said proposed improvement due by the city out of the funds available for that purpose."

On the 8th day of January, 1906, the city council passed the following resolutions:

"Whereas, the city council of the city of Paris deems it to the in-

terest of the city that that portion of South Main Street between the south side of the public square and the north side of Sherman Street be paved with vitrified brick on a six (6)-inch concrete foundation, and that the owners of the property abutting on said portion of said street pay one-third of the cost of the proposed paving in front of their premises and the street railway be required to pay the cost of paving between its rails and one foot on each side thereof; and whereas, said property will be, in the opinion of the city council, specially benefited to the extent of the cost of the proposed paving in front of it; now, therefore, be it resolved by the city council of the city of Paris:

"Section 1. That the said council deems it to the interest of the city that that portion of South Main Street between the south side of the public square and the north side of Sherman Street be paved with vitrified brick on a six (6)-inch concrete foundation, and that one-third of the costs of the proposed paving be assessed against the property abutting on each side of said street, and that the cost of paving between the rails of the street railway company and one foot on each side be assessed against said street railway company, and that one-third of the entire cost of said paving be paid by the city, less the portion to be paid by the street railway company.

"Section 2. That the city engineer is hereby directed and instructed to submit a written report to the city council at its next regular or special meeting of the estimated cost of the proposed improvements, and also a list of the names of all persons, corporations or associations owning property abutting on said portion of South Main Street, and to place opposite each name on said list the respective dimensions of the property owned by each person, corporation or association, and also the estimated cost of the proposed improvement in front of each piece of abutting property in proportion to its frontage on South Main Street."

On the 20th of January, 1906, the council passed the following resolution:

"Whereas, on the 20th day of January, 1906, the city council passed a resolution authorizing and directing the city engineer to prepare estimates, plans and specifications, etc., for the proposed paving of South Main Street between the south boundary line of Clarksville Street and the north boundary line of Sherman Street; and whereas, the said city council is now desirous of also paving that portion of said street between the north boundary line of Sherman Street and the north boundary line of Washington Street, and estimates as to cost of same having been submitted by the city engineer; now, therefore, be it resolved by the city council of the city of Paris: That the resolution passed by the city council on the 20th day of January, 1906, be and the same is hereby amended so that wherever it now appears in said resolution describing the particular portion of street to be paved to be the portion of same between the south boundary line of Clarksville Street and the north boundary line of Sherman Street, the same be changed so as to hereafter read that portion of South Main Street between the south boundary line of Clarksville Street and the north boundary line of Washington Street." At a special

meeting of the council on January 29, 1906, the following resolution was passed:

"Whereas, on the 8th day of January, 1906, the city council of the city of Paris passed a resolution requiring that portion of South Main Street between the south boundary line of the public square and the north boundary line of Sherman Street to be paved with vitrified brick on a six-inch concrete foundation, and instructed the city engineer to submit plans and specifications, list of property owners and estimated cost of improvement; and whereas, on the 29th day of January, 1906, said resolution was amended so as to include that portion of South Main Street between the south boundary line of the public square and the north boundary line of Washington Street; and whereas, the engineer submitted an amended list of property owners, and a new estimate of the cost, and notice of the proposed improvement having been given to the property owners on said street by publishing a notice for ten days in the Paris Daily Advocate; and whereas, all of the objections filed by said property owners and such evidence as they desired to present, was duly heard by the city council on the 26th day of February and on the 5th day of March, 1906, and all objections were by said city council overruled and disallowed on the 12th day of March, 1906; and whereas, the said city council is still of the opinion that the proposed improvement should be made; now, therefore, be it resolved by the city council of the city of Paris:

"Section 1. That the mayor is hereby authorized and instructed to advertise for bids for the construction of the proposed improvement on South Main Street between the south boundary line of the public square and the north boundary line of Washington Street, the said bids to be made on the plans and specifications heretofore prepared by the city engineer."

Afterwards, on the 9th day of July, 1906, an ordinance was duly passed ordering the particular improvements and levying the proper assessments against abutting property owners and providing when the assessments shall be due, and the mode and manner of collecting. As this ordinance is not involved, it is not more particularly stated.

After stating the case.—We assume the court sustained the demurrer upon the grounds presented in the briefs. All the provisions of the charter defining the mode in which the right to levy the assessment as against the owner is to be acquired had been, we think, complied with in the record, and the levy of the assessment was not void. A resolution was passed declaring the purpose to make the street improvement as a benefit to the public, and describing the particular portion of the street to be improved, and the nature and character of the pavement, and adopting complete plans and specifications for same with the estimated cost of the improvement, and providing and giving the required notice to abutting property owners to be heard before assessments were levied and finally determined upon, and after the time of notice and hearing the public advertisement for bids, and the letting of the contract to the lowest bidder, and the determination of the proportionate cost to be borne by each property owner as his property was enhanced in value and according to the frontage on the improvement. All the steps provided for and intended for the pro-

tection of the property owner, and his safeguard against the exercise of arbitrary power by the council directed by the charter to be taken as a preliminary to ordering the work done, it is seen, were taken by the city council. This being true, the power to make the levy existed, and it was lawful. It is urged, though, that the levy of the assessment must be held void because the resolutions passed by the city council on January 20th and 29th failed to comply with the methods of procedure prescribed by section one of the general improvement ordinance. The failure, it is claimed, consists in not directing the engineer to make out a report containing a list of the dimensions of each piece of property and the names of the owners thereof abutting on such portion of said street, and accompany the same with complete plans and specifications at the next meeting of the council. The face of the original resolution of January 8th specifically directed this very procedure, and the other two resolutions mentioned were merely amendatory of and an enlargement of the original, and so declared in the face of the amendatory resolutions. All the original procedure in the original resolution continued to become a part of the amended resolutions, and unnecessary to be further stated in words. The amendatory resolutions were in their nature purely amendatory, and not a distinctive and independent proceeding. The jurisdiction of the council attached over the original and by authority of that jurisdiction the power to amend and add thereto existed and continued. The authority to extend the territory of improvement beyond that provided in the original resolution by amending the original to that effect existed as in the first instance. If the authority existed, as it did, to the city council by resolution, as it did, to amend the original resolution by enlarging the portion of the street to be improved, then we are unable to perceive how the fact, if so, of the council not waiting "until the next regular or special meeting" to receive data of estimated cost, and the names of property owners, and the dimensions of each piece of property on the proposed improvement, would render void the assessment. The engineer's report was called forth in the original resolution, and he was there in obedience to such call, and if the council was convinced that he had the full and complete data necessary for the extended territory then at hand, and used such information then instead of at the "next meeting," it would be a mere harmless irregularity at most. Such literal procedure was not prescribed by the charter as an essential and condition precedent to the levy of the assessment. Neither would such a fact invade any safeguard of the rights of the property owner. The substance of the requirement is that the information be obtained from the engineer's report, and this the resolutions recite on their face, and, in fact, was done. See Flewellin v. Proetzel, 80 Texas, 191, 15 S. W., 1043; City of Galveston v. Heard, 54 Texas, 420; City of Waco v. Chamberlain, 92 Texas, 207, 45 S. W., 527. The cases cited of Wood v. City of Galveston, 76 Texas, 126, 13 S. W., 227, and Frosh v. City of Galveston, 73 Texas, 409, 11 S. W., 402, present different proceedings on the facts from the instant one.

The assessment is attacked as void because the section of the city charter authorizing the assessment is unconstitutional. The particu-

lar section, No. 138, of the charter provides: "Subject to the provisions of sections 135 to 148 of this Act, the city council shall have the power to provide for and order the construction or reconstruction of any street improvement, or any two or more of such improvements, on any street or streets, alley or alleys, in the city of Paris; and to assess the cost of such improvement or improvements, or so much of the cost as may be deemed just and proper, against the property specially benefited thereby, and against the owners of such property personally; provided, that the cost or part of the cost specially assessed against any property or property owner shall not exceed the amount of the special benefit in enhanced value which such property shall receive from such improvements." Section 147 provides: "The city council shall have full power, by ordinance or resolution, to prescribe such methods of procedure and such general or special rules and regulations as may be deemed just and proper to fully execute and enforce the purposes and provisions of sections 135 to 148 of this Act; and the city council shall have the power to inquire into and determine all matters of fact necessary for any and all proceedings under said sections of this Act; and the findings and conclusions of the city council shall be conclusive." The ordinance levying the particular assessment, among other things, provides: "That all the property abutting on the proposed improvement will be benefited to the extent of the cost to the property owner of the proposed improvement in proportion to its frontage on said street, and that for the purpose of paying the property owner's proportion of the cost of the improvement there is hereby levied and assessed against each respective owner of abutting property, and against the property itself in proportion to its frontage on said street, one-third of the amount necessary to pay the cost of constructing the improvement in front of each respective piece of property; that is to say, there is hereby levied and assessed against Mrs. H. L. Brenneman the sum of $448, which shall be a personal charge against the said Mrs. H. L. Brenneman, and on failure or refusal to pay, the same may be collected by suit in any court of competent jurisdiction." There are several reasons urged as to the unconstitutionality of the proceeding authorized by the charter. It is insisted that by the terms of the charter the city council are constituted the only tribunal to hear and determine the question of fact and inquiry as to whether the property abutting on the improvement is to be "specially benefited thereby," and their determination of the amount to be assessed against the abutting owner is made conclusive without appeal, and because thereof, it is claimed, it is in contravention of the Fourteenth Amendment of the Constitution of the United States, which provides: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The questions raised have been fully decided and need no elaboration here. The instant charter and improvement ordinance provide for a full and fair hearing on all matters affecting the property and claim for liability against the person. In this respect it makes the case clearly distinguishable from Hutchison v. Storrie, 92 Texas, 685, 51 S. W., 848, and Norwood v. Baker, 172 U. S., 269. The charter provides in

section 144: "Any person interested in any property which may be claimed to be subject to assessment under this Act shall be entitled to a full and fair hearing before the city council on all matters affecting such property or any claim of personal liability." The improvement ordinance, it is seen by reference thereto, makes provision for notice to appear and present objections to the proposed improvement, the cost and benefit to their property, and other objections. See French v. Barber Asphalt Co., 181 U. S., 323; Detroit v. Parker, 181 U. S., 399; Cass Farm Co. v. Detroit, 181 U. S., 396; Schaefer v. Werling, 188 U. S., 515; Hibben v. Smith, 191 U. S., 309.

It is claimed that the sections of the charter are violative of sections 15, 17 and 19 of article 1 of the Constitution of the State. As assessments for public improvements are regarded as a species of taxation, property owners are not entitled to have the assessment made by a jury. 24 Cyc., p. 133. The assessment of property for cost of improvement is a tax. City of Austin v. Nalle, 102 Texas, 536, 120 S. W., 996. Section 17 does not apply here. Norris v. City of Waco, 57 Texas, 635. Nor do the provisions of the charter contravene section 13 of article 1 of the Constitution. It can not be said that the taking of property under the taxing power is not a taking under due process of law. Werner v. City of Galveston, 72 Texas, 22, 12 S. W., 157; Davidson v. City of New Orleans, 96 U. S., 97. It is well settled that the provisions of section 1, article 8, that taxation shall be equal and uniform do not apply to special assessments. Roundtree v. Galveston, 42 Texas, 626; Taylor v. Boyd, 63 Texas, 533; Allen v. City of Galveston, 51 Texas, 302. There was error, we think, in not overruling the general demurrer, and the case was ordered reversed and remanded.

Reversed and remanded.

GALVESTON ELECTRIC COMPANY v. A. T. DICKEY.

Decided March 4, 1910.

1.—Personal Injuries—Pleading—Charge.

In a suit to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, if the plaintiff's petition specifies the particular acts of negligence relied on, no other acts of negligence should be submitted to the jury as ground of recovery. In such a suit, charge considered, and held subject to the objection that it failed to submit to the jury the specific grounds of negligence alleged in plaintiff's petition, but in general terms instructed a verdict for the plaintiff if the negligence of the defendant was the proximate cause of the injury.

2.—Master and Servant—Admission of Servant—When not Admissible.

In a suit for damages for personal injuries received while alighting from a street car about nine o'clock in the morning, testimony as to a statement of the conductor made in the afternoon of the same day as to how the accident occurred would not be admissible as part of the res gestae, nor as an admission that the witness was authorized to make, nor would it be admissible for the purpose of contradicting or impeaching the conductor in the absence of a predicate for that purpose.

Appeal from the District Court of Galveston County. Tried below before Hon. Lewis Fisher.

Terry, Cavin & Mills, for appellant.—That the charge must conform to the pleadings and submit to the jury the very issues made thereby, and none other, is a rule so firmly established that authorities in support of it need not be cited. The only question here is whether the charge now complained of violates that rule.

In International & G. N. R. Co. v. Eason, 35 S. W., 209, a case in which the specific acts of negligence were set up in the petition, the court held: "The specific acts of negligence having been set forth, the charge should have been confined to those acts."

In McCarty v. Houston & T. C. Ry. Co., 21 Texas Civ. App., 575, the court said: "We are also of the opinion that the court should have submitted to the jury each ground of recovery which was made an issue in the pleadings and found support in the evidence. This the court did not clearly and distinctly do."

The statements of O. M. Palmer, conductor, detailed by Mrs. Dickey, were no part of the *res gestae,* and said O. M. Palmer was no such agent, representative or employe of appellant as that his statements made after the transaction would be admissible in evidence against the appellant as admissions against interest. McAlpin v. Cassidy, 17 Texas, 450; International & G. N. R. Co. v. Ragsdale, 67 Texas, 24; Chicago, R. I. & T. Ry. Co. v. Yarbrough, 35 S. W., 422; Gulf, C. & S. F. Ry. Co. v. Southwick, 30 S. W., 592; Belo v. Fuller, 84 Texas, 450; City of Austin v. Forbis, 13 Texas Ct. Rep., 818; Western U. Tel. Co. v. Wofford, 42 S. W., 119.

If the statements of said O. M. Palmer, testified to by said Mrs. A. T. Dickey, were offered for the purpose of impeaching the testimony of said O. M. Palmer, who testified as a witness for the appellant, then her testimony detailing said statements was not admissible in evidence, because no predicate whatever has been laid for introducing evidence of such statements as impeaching evidence by asking the witness, Palmer, if he had ever made any such statements to Mrs. Dickey. Ayres v. Duprey, 27 Texas, 599, 600; Cabell v. Holloway, 10 Texas Civ. App., 307, 310.

Marsene Johnson, for appellee.

PLEASANTS, CHIEF JUSTICE.—The following sufficient statement of the nature and result of this suit is copied from appellant's brief:

"This is a suit brought by the appellee against the appellant to recover damages alleged to consist of money expended for medicines, surgical appliances, nurses and physicians, and the value of the services of his wife as a nurse, appellee alleging that all said damages resulted from injuries alleged to have been negligently inflicted by the appellant upon his minor child while a passenger upon one of the appellant's street cars in the city of Galveston, November 18, 1906. After alleging that on said date appellee's three minor children were passengers on one of defendant's street cars, the particular acts of

negligence relied upon by the appellee are set out in his petition as follows:

"And plaintiff further alleges that the eldest of his said children got safely off said street car when it stopped, and that the conductor of said car, who was then and there the servant and employe of defendant, took hold of the youngest one of plaintiff's said children under her arms and negligently swung plaintiff's said child around off said car over the pavement, and negligently, without using any care whatever, permitted plaintiff's said child to fall from his hands, a distance of several feet, on to said pavement, causing her to sustain the injuries hereinafter set out. And plaintiff further alleges that said conductor of said street car did not leave the platform, and descend to the pavement, before attempting to assist the youngest child of plaintiff, as aforesaid, who was and is a tender child under the age of four years, to alight from said car, but that defendant's conductor did, in a grossly negligent manner and without using even ordinary care, raise the plaintiff's said child under her two arms, with her back towards him, and swing her around over the pavement and drop her thereon."

Appellant answered by general denial, and plea of not guilty, and plea of contributory negligence on the part of the parents of appellee's child in permitting her to travel on its street cars without proper attendants.

The cause was tried by a jury October 12, 1908, and resulted in a verdict and judgment in favor of appellee against appellant for $318.50.

The first assignment of error complains of the charge of the court on the ground that it fails to submit to the jury the specific grounds of negligence alleged in plaintiff's petition, but in general terms instructs the jury to find for the plaintiff if they believe from the evidence that the conductor of the car, in assisting plaintiff's child to alight therefrom, "failed to use that high degree of care and caution for her safety that would have been used and exercised by a person of a high degree of care and caution under the same or similar circumstances; and further believed from the evidence that such failure, if any, of said conductor to exercise that high degree of care and caution that would have been used and exercised by a person of a high degree of care and caution under the same or similar circumstances," was the proximate cause of the injury of said child.

We think the objection to the charge is valid. It is unnecessary to cite authorities upon the proposition that in a suit to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, if the plaintiff's petition specifies the particular acts of negligence relied on, no other acts of negligence than those alleged in the petition should be submitted to the jury as ground of recovery.

It is clear that under this charge the jury were authorized to find for plaintiff if the injury to his child was the proximate result of the want of the proper degree of care on the part of the conductor, regardless of whether such care was lacking with respect to the matters alleged in the petition. The specific acts of negligence having been

alleged, the charge should have been confined to them. International & G. N. Ry. Co. v. Eason, 35 S. W., 209.

The charge complained of under the second assignment of error instructs the jury that if they believe from the evidence "that the said child attempted to jump from said car, and fell to the ground before the conductor could catch her, and that the conductor exercised that high degree of care and prudence that would have been exercised and used by a person of a high degree of care and prudence under the same or similar circumstances in attempting to prevent her from falling, then you will return a verdict for the defendant."

If the only issue of negligence submitted to the jury had been that alleged in the petition, this charge not being affirmative or abstract error would not have been misleading, and therefore not reversible error; but in view of the error in the charge complained of under the first assignment, which we have before pointed out, we think this charge was misleading, and calculated to emphasize such error.

The third assignment of error is as follows: "The court erred in admitting in evidence before the jury, over the objection of said defendant, the testimony of the plaintiff's witness, Mrs. A. T. Dickey, in substance that, in the afternoon of the day on which the plaintiff's child, Mary Elizabeth Dickey, was injured (such injury having occurred in the neighborhood of nine o'clock in the forenoon of said day at a point some distance from the residence of the witness), that O. M. Palmer, the conductor of the car on which said Mary Elizabeth Dickey was a passenger at the time of her injury, came to the house of the witness and stated to her that he (said conductor) dropped said Mary Elizabeth Dickey; that he failed to get hold of one arm and dropped her; and, in substance, that said O. M. Palmer at that time did not say anything to said witness about said Mary Elizabeth Dickey jumping off the car."

This testimony was introduced over the objections of the defendant that it was not *res gestae,* nor an admission by one whose admission would be binding on or evidence against the defendant, and, if offered for the purpose of impeaching the witness Palmer, it was inadmissible, because no predicate had been laid therefor.

The record shows that the witness Palmer, who testified for the defendant, was not interrogated by plaintiff as to any statement made by him to Mrs. Dickey of the kind testified to by her. No predicate having been laid for such testimony, under a similar rule of evidence the contradictory statement of the witness was not admissible for the purpose of impeaching him.

It is not contended that the statement was *res gestae,* and we think it is clear that it was not admissible as original evidence because it was not an admission that the witness was authorized by the defendant to make, and therefore could not be used in evidence against the defendant. McAlpin v. Cassidy, 17 Texas, 466 and 467; Belo & Co. v. Fuller, 84 Texas, 454; Chicago, R. I. & T. Ry. Co. v. Yarbrough, 35 S. W., 422.

For the errors indicated the judgment of the court below should be reversed and the cause remanded, and it has been so ordered.

Reversed and remanded.

D. L. WALKER v. L. A. DE VILLENEUVE.

Decided March 4, 1910.

1.—Appeal—Jurisdiction—Amount in Controversy.

A Court of Civil Appeals has no jurisdiction of an appeal from a County Court in a case originating in the Justice Court wherein the amount sued for is $100.

2.—Same.

Where the jurisdiction of the Court of Civil Appeals depends upon the amount in controversy it is not permissible in determining the amount in controversy to add together the amount sued for by the plaintiff and the amount sued for by the defendant by plea in reconvention. Either the plaintiff's demand or that of the defendant must in and of itself reach the jurisdictional sum.

Appeal from the County Court of Jefferson County. Tried below before Hon. Jas. A. Harrison.

Thos. N. Hill, for appellant.

No brief for appellee.

PLEASANTS, CHIEF JUSTICE.—This suit was brought by appellee in the Justice Court of precinct No. 1 of Jefferson County to recover the value of a moving-picture machine, alleged to have been converted by the defendant and his partner in the moving-picture show business. The value of the machine is alleged to be $100, and plaintiff prays for the recovery of that amount. An attachment was issued from the Justice Court upon application of plaintiff, and was levied upon property of appellant.

Appellant's answer filed in the Justice Court, in addition to a general denial and other pleas, contains a plea in reconvention by which he asks to recover damages from plaintiff in the sum of $50 caused by the alleged wrongful suing out and levying of the attachment.

The trial in the Justice Court resulted in a judgment in favor of plaintiff for the sum of $50, and upon appeal by the defendant to the County Court and a trial *de novo* therein, a like judgment was rendered.

This court has no jurisdiction of causes of which the County Court has appellate jurisdiction unless the "amount in controversy or the judgment rendered exceeds $100 exclusive of interest and costs." Article 996, Sayles' Civil Statutes. In determining the amount in controversy it is not permissible to add to the amount claimed by plaintiff that sought to be recovered by the defendant by cross-action or by plea in reconvention. In order to give the appellate court jurisdiction, where such jurisdiction depends upon the amount in controversy, either the plaintiff's demand or that of the defendant must itself reach the jurisdictional sum. Crosby v. Crosby, 92 Texas, 441; Tucker v. Williams, 56 S. W., 585.

Neither the demand of plaintiff nor that of the defendant in this case being in excess of $100, this court is without jurisdiction to hear and determine the appeal, and it is therefore dismissed.

Dismissed.

TEXAS & PACIFIC RAILWAY COMPANY v. JACK PIPPIN.

Decided March 5, 1910.

Parties—Burning Grass.

The owner of grass growing upon land (in this instance, a lessee) may sue to recover damages for its negligent destruction by fire, although he was not the owner of the land.

Appeal from the County Court of Eastland County. Tried below before Hon. E. A. Hill.

Earl Conner, for appellant.

J. J. Butts, for appellee.

DUNKLIN, ASSOCIATE JUSTICE.—This suit was by Jack Pippin against the Texas & Pacific Railway Company to recover the value of grass alleged to have been burned through the negligence of the defendant, and is a companion case to Texas & Pacific Railway Company v. Wooldridge & Hamby, ante, 384 (126 S. W., 603). The charges given in the two cases were the same, and for the reasons stated in the other case the judgment in this is reversed and the cause remanded for another trial.

But the record in this contains one assignment of error not presented in the former case, which must be discussed. It is contended that, as the evidence showed that the land upon which the fire occurred belonged to plaintiff's father, and not to plaintiff himself, the court erred in refusing to direct a verdict in defendant's favor, or else to charge the jury, as specially requested by defendant, to find in its favor if plaintiff had not proved that he was the owner of the land at the time of the fire. If plaintiff was the owner of the grass, as the evidence clearly showed, he could maintain the suit for its loss through defendant's negligence, even though he did not own the land, and that fact having been established by uncontroverted testimony, there was no error in refusing to peremptorily instruct a verdict for the defendant, nor in refusing the requested instruction. Texas & Pacific Ry. Co. v. Bullard, 127 S. W., 1152; Sutherland on Damages (2d ed.), sec. 1012.

Reversed and remanded.

HARRIS MILLINERY COMPANY v. A. W. BRYAN ET AL.

Decided March 5, 1910.

1.—Contract—Acquiescence in Statement—Evidence.

Acquiescence, to have the effect of an admission of the party to be affected thereby or to constitute a concurrence in what is being said or done by another, must exhibit some act of the mind and amount to voluntary demeanor or conduct of the party sought to be bound thereby; and it must plainly appear that such conduct was fully known or the language fully understood by such party before any inference of assent can be drawn from his silence.

2.—Venue—Contract to Deliver Goods—Insufficient Evidence.

The mere fact that the manager of a private corporation was present in the room when and where the attorney for the purchaser of goods from the corporation dictated to the bookkeeper of the corporation an agreement, endorsed on the invoice of the goods, that the goods were to be delivered by the corporation at the residence of the purchaser in another county, was not sufficient to support a finding that the manager heard and assented to the agreement as to the delivery of the goods, and hence insufficient to fix the venue in the county of the purchaser's residence in a suit for damages for failure to deliver the goods as per contract.

ON REHEARING.

3.—Plea of Privilege—Practice.

Under the Act of the Thirtieth Legislature (Laws, 1907, p. 249) when a plea of privilege to be sued in a different county is sustained, the suit should not be dismissed but an order should be entered transferring the suit to the county and court to which the venue was changed.

Appeal from the County Court of Hunt County. Tried below before Hon. J. W. Manning.

Looney & Clark, for appellant.

B. Q. Evans, for appellees.

TALBOT, ASSOCIATE JUSTICE.—The appellee, Mrs. A. W. Bryan, who was then Miss V. G. Kennedy, in June, 1908, brought this suit in the County Court of Hunt County, Texas, against the appellant, Harris Millinery Company, a private corporation doing business and domiciled in the city of Dallas, Dallas County, Texas, and Henry Pollock, also residing in said last named county, and the First National Bank of Greenville, having its principal office and place of business in the city of Greenville, Hunt County, Texas, to recover damages alleged to have been sustained by her on account of the failure of appellant to comply with an alleged contract to deliver certain millinery goods in Greenville on the night of February 28, 1908. The plaintiff married the appellee, A. W. Bryan, pending the suit and they thereafter jointly prosecuted the same.

The petition alleges, so far as is necessary to state, that on the 28th day of February, 1908, V. G. Kennedy (now Bryan) purchased from appellant, Harris Millinery Company, at Dallas, Texas, a bill of goods invoicing $439.66, and fifty hat boxes and one hundred hat bags for the sum of $300 cash and a note for $50 to be thereafter executed; that appellant contracted in writing to deliver said goods in Greenville, Texas, on the night of February 28, 1908, but failed and neglected to deliver said goods, as contracted, for a period of about twelve days thereafter, to plaintiff's damage in the sum of $91 for loss of time for herself and trimmer and for house rent paid during the time before said goods were delivered. That when her said goods were delivered they checked short items aggregating $67.50 of the value of $100; that she returned to defendant items of goods aggregating $13.95; that the flowers included in the bill purchased aggregated $80, but that after plaintiff had paid for the

goods other and cheaper flowers were substituted by appellant and that the flowers received were worth no more than $30, to plaintiff's damage in the sum of $50; and that there was a considerable difference in the value of the other goods represented by the invoice and those shipped, cheaper goods having been substituted for those selected and shown by the invoice, and that the goods received were worth at least fifteen percent less than those that should have been shipped. It was further alleged that plaintiff owed appellant a note for $50 for a previous bill of goods; that this note had been transferred by appellant to Henry Pollock for the purpose of cheating and swindling plaintiff out of said note, and that the same was then in the hands of the First National Bank of Greenville for collection, and that upon a settlement between plaintiff and the Harris Millinery Company, when the amount of said note has been deducted, the said defendant will still owe plaintiff a sum of money more than $200; and that the transfer of said note by Harris Millinery Company to Henry Pollock was done to avoid a settlement of plaintiff's just claim against the Harris Millinery Company. This suit was dismissed before the trial as to both Pollock and the First National Bank of Greenville.

The appellant, Harris Millinery Company, filed a plea of privilege to be sued in Dallas County, and, subject thereto, a general demurrer, general denial and special answer not necessary to state. The case, including appellant's plea of privilege, was tried before a jury and resulted in a verdict and judgment for plaintiffs against the plea of privilege, and against appellant for the sum of $250.

Appellant's motion for a new trial having been overruled, he perfected an appeal to this court, and his first assignment of error is as follows: "The undisputed evidence showed that the County Court of Hunt County had no jurisdiction of the cause against appellant, and its plea of privilege to be sued in the county of its domicile should have been sustained. The evidence relied on to show that the contract was to be performed in Hunt County, showed that, if any such contract was made, it was dictated to appellant's bookkeeper by plaintiff's lawyer after the contract for the sale of the goods had been completely made, and the bookkeeper had no authority to make such a contract, did not intend or understand that same was being made, and thought that he was merely writing a receipt for the money paid. Besides, there was no consideration for such contract, and the court erred in refusing to give defendant's special charge No. 7." We think the assignment must be sustained. The evidence conclusively shows that the appellant's domicile was in Dallas County; that it never had an office or agent of any character in Hunt County, and it was insufficient to authorize the finding of the jury that the contract was to be performed—that is, the goods delivered—in Hunt County. The material testimony bearing upon the latter question is, in substance, that the appellee, Mrs. Bryan, selected the goods bought by her from appellant on the 26th and 27th days of February, 1908, telling appellant to get the goods out as quickly as possible. They were to be shipped by express and appellee agreed to pay the express charges and for the goods $350. After selecting the goods appellee

went to her home in Greenville and then arranged with appellant to pay it $300 cash and give her note for $50 for the goods, and sent her attorney, Mr. B. Q. Evans, with the $300 to Dallas to make the cash payment.

Mr. Evans testified: "With reference to that invoice—I had the invoice Sunday. I lost that invoice, and I caused a search to be made; had Mr. Bryan to examine the buggy I was in, and all the places I had any recollection of being, and I am not able to find it. However, the invoice was exactly like that, except the memorandum. I described it in my petition and made it a part of my petition in this case, and the reason I didn't put it in was the reason that when I made this amended petition, I overlooked it or something. Now, the memorandum, it was in the form of a receipt. It started at the top, $300 cash, $50 to be paid June 15. I think it gave the amount of the invoice as $439.66. I believe that was it, one hundred hat bags, fifty hat boxes, one hundred paper bags. These goods to be delivered to Greenville tonight. H. M. Co. That was on the invoice. About Harris, he was sitting there in the chair. It was done by the bookkeeper. I don't know anything about his not knowing it, but I know that was the understanding that the agreement was made and put down on the back of the invoice, 'these goods to be delivered to Greenville tonight.'" He further testified that the memorandum which he says was endorsed on the inventory of the goods by appellant's bookkeeper was dictated by him and that he knew exactly its legal effect. That appellee agreed to pay $350 for the goods over the 'phone; that she could not raise but $300 of the amount and that he came to Dallas to bring that amount of money and arrange for the balance due on the goods until appellee could pay it. That was the cause of his trip to Dallas.

Jones, appellant's bookkeeper, testified: "I am connected with Harris Millinery Company. I am just merely an employe. I don't own any stock in the company. I remember the night you were over, Mr. Evans. I was the bookkeeper. I think I made an entry of whatever you paid on the bill, but don't remember any entry about paper bags or anything of that kind. My recollection is that I receipted in the invoice for the amount of money paid. I probably showed there what the balance of the consideration was to be. That is my recollection. I don't remember about anything else on it. My recollection is that it was in the form of a receipt, that I put down the amount of money I received and the deduction paid on the bill. I probably signed the receipt, H. M. Co., which means Harris Millinery Company. To my recollection I stated nothing to the effect that the goods were to be delivered in Greenville;" that he and Mr. Evans had not made any contract as to whether to deliver the goods at Greenville; that he had never heard of anything of that kind; that there was something said about shipping the goods that night.

It will be noted that the ground relied on to authorize the bringing of the suit in Hunt County and to sustain the jurisdiction of that court, is that by the memorandum endorsed on the inventory of the goods at the dictation of Mr. Evans, "These goods to be delivered to Greenville tonight," appellant thereby contracted in writing

to perform the contract in Hunt County. This position, we believe, can not be maintained. The goods had been selected, invoiced and placed in the shipping room and the terms of the trade agreed to before Mr. Evans came to Dallas to make the cash payment of $300. Mr. Harris, the manager of appellant, and with whom it appears the contract of sale was made, testifies positively that he "was not to deliver the goods at Greenville, but to the express company," and Mr. Evans, upon whose testimony alone appellee relies to prove that the goods were to be delivered by appellant at Greenville, does not swear, as we understand his testimony, that he had any such understanding or agreement with Harris or anyone else except the bookkeeper, and there is no evidence tending to show that the bookkeeper, who the undisputed testimony shows was a mere employe of appellant, had authority to make such a contract, if he did make it, and bind appellant thereby, and such authority can not be implied from the mere fact of employment. It is elementary that there is no contract unless the parties thereto assent; and they must assent to the same thing in the same sense. This is true whether the contract be in writing or merely verbal. (1 Parsons on Contracts, 9th ed., page 475.) That appellant, by anyone authorized to bind it, assented to the agreement embodied in the memorandum endorsed on the invoice of the goods sold to appellee, is not shown by any testimony that would justify such a conclusion. The fact that Mr. Harris was sitting in the room while appellee's attorney, Mr. Evans, was dictating and the bookkeeper writing the memorandum on the inventory, is not sufficient evidence of such assent. It does not appear that Mr. Harris heard and understood the purport of the language used by Mr. Evans. To have authorized a finding that Harris assented to such a contract as is embraced in said language it was necessary for appellees to show that the language was heard by Harris and that he made no objection thereto. Acquiescence, to have the effect of an admission of the party to be affected thereby or to constitute a concurrence in what is being said or done by another, "must exhibit some act of the mind and amount to voluntary demeanor or conduct of the party sought to be bound thereby. And, whether it is acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known or the language fully understood by such party before any inference can be drawn from his silence." (Bass v. Tolbert, 51 Texas Civ. App., 437 (112 S. W., 1077); 1 Green. on Ev., sec. 197.) Again, Mr. Greenleaf says: "The mere silence of one, when facts are asserted in his presence, is no ground of presuming his acquiescence unless the conversation was addressed to him under such circumstances as to call for a reply." Sec. 197a. Now, while there is evidence, as heretofore shown, that Harris, the general manager of appellant, was sitting in a chair and perhaps near Evans and Jones, the bookkeeper (the distance not appearing), when Evans dictated the memorandum in question, yet it clearly appears that the dictation and anything said in reference thereto was addressed to Jones, and the only foundation for the belief that Harris heard anything that was said in that

connection and understood its import, is his presence there. Under such circumstances, and the rule announced above, the jury was not warranted in finding that Harris not only heard what passed between Evans and Jones in relation to the memorandum endorsed on the inventory of the goods sold to appellee, but that he fully understood and acquiesced therein. This being true, the trial judge, upon the conclusion of the evidence, should have withdrawn the case from the jury and sustained appellant's plea of privilege to be sued in Dallas County.

The judgment of the lower court is therefore reversed and the cause dismissed.

ON REHEARING.

Appellees' motion for rehearing is overruled. We erred, however, in dismissing the case. The Act of the Thirtieth Legislature amending chapter 4 of title XXX of the Revised Statutes by adding article 1194c, which was overlooked when the original opinion was written, provides: "That whenever a plea of privilege to the venue to be sued in some other county than the county in which the suit is pending shall be sustained, the court shall order the venue to be changed to the proper court of the county having jurisdiction of the parties and cause, and that the clerk shall make up a transcript of all the orders made in said cause, certifying thereto officially under the seal of the court, and transmit the same with the original papers in the cause to the clerk of the court to which the venue has been changed." It is therefore ordered that the judgment heretofore rendered in this cause in this court dismissing said cause be set aside, and that judgment be entered therein changing the venue of the same to the County Court at Law of Dallas County, Texas, with instructions to the clerk of the County Court of Hunt County, Texas, to make up the transcript and transmit the same, together with the original papers, to said County Court at Law of Dallas County, in accordance with the provisions of the above mentioned Act.

It is further ordered that the judgment of this court be certified to said County Court of Hunt County for observance.

Reversed and remanded.

HERMAN KRUEGEL v. MURPHY & BOLANZ ET AL.

Decided March 5, 1910.

1.—Mandamus—Parties.

In a mandamus proceeding to compel the clerk of a court to issue an execution on a judgment, the judgment debtor may properly be permitted to intervene and contest the motion.

2.—Bankruptcy—Judgment Debtor.

A judgment debtor is relieved from payment of the judgment when the same has been duly scheduled and the judgment creditor notified of the bankruptcy proceeding. Execution should not thereafter issue on such judgment.

3.—Same—Judgment Creditor.

In the absence of evidence that a personal judgment reverted to a bankrupt at the close of bankruptcy proceedings against him, it will be presumed that the title thereto had passed out of him, and he would have no right to demand that execution issue thereon or to collect the same.

4.—Jury Trial—Refusal not Error, when.

When the evidence is such that the trial court should have instructed a verdict for the defendant had the case been tried with a jury, the refusal of the court to allow the plaintiff to have a jury can not be reversible error.

5.—Day in Court.

It would seem that when there were three other final judgments involving the same questions and between the same parties, besides three other suits involving the same questions between the same parties pending on appeal, in all of which the appellant was cast in the actions, it could not be said that the appellant had not had his "day in court."

Appeal from the District Court of Dallas County. Tried below before Hon. Kenneth Foree.

Herman Kruegel, for appellant.

Cobb & Avery, for appellee.

RAINEY, CHIEF JUSTICE.—This is an appeal from a judgment of the Fourteenth District Court rendered against the appellant on a motion filed by him in case No. 12,634, Herman Kruegel v. Murphy & Bolanz, for the writ of mandamus to compel the district clerk to issue a writ of execution to enforce the collection of a monied judgment rendered in his favor in said cause No. 12,634. Murphy & Bolanz, by permission of the District Court, made themselves parties defendant and filed an answer. The clerk did not answer. The motion was duly heard and resulted in a judgment for defendants, and Kruegel appeals.

Conclusions of Fact.—The trial judge filed conclusions of fact which are supported by the evidence and we adopt the same as the conclusions of fact of this court, which are as follows:

"I find the following to be the facts from the evidence given in the motion and application for mandamus in the above cause.

"First. On March 17, 1894, Herman Kruegel recovered in this court a judgment against J. P. Murphy and Chas. F. Bolanz for $1318.60, bearing six percent interest from date, and costs of suit, numbered and styled as above.

"Second. About May 16, 1903, said Chas. F. Bolanz brought a suit in this court, No. 22468, against said Herman Kruegel and others for the purpose, among other things, of enjoining the collection of the above mentioned judgment and setting up, among other things, that said Murphy & Bolanz had been released and discharged from said judgment by proceedings in bankruptcy duly had since the rendition of said judgment, and that an execution had been issued on said judgment and levied on a certain lot, etc., said in-

junction suit No. 22468 was by an order duly made and entered in the minutes of this court, transferred by this court for trial to the Forty-Fourth Judicial District Court within and for Dallas County, and that court acquired and had full jurisdiction of said case, and said court, after a trial on the merits at which all parties appeared, on March 26, 1904, duly rendered judgment and entered its judgment and decree which enjoined said Kruegel and the clerk of this court and his deputies and his successors in office from issuing any execution whatever on or by virtue of said judgment first above mentioned; and enjoined the sheriff of Dallas County and his deputies and his successors in office from levying an execution which might be issued on said judgment, said Kruegel and said clerk and said sheriff having notice of and being parties to said injunction suit and decree, which judgment and decree is still in full force and effect and not appealed from.

"Third. There have been heretofore in this court three applications for mandamus brought by said Kruegel, similar to the present one and between the same parties; in the first one a final judgment was rendered by this court on October 2, 1905, and in the second a final judgment was rendered by this court on May 12, 1908, and in the third a final judgment was rendered by this court October 10, 1908, and in each of these final judgments a similar application for mandamus by said Kruegel against the clerk of this court was refused and denied, based on same judgment as in case No. 22468, and these three judgments are still in full force and effect and not appealed from.

"Fourth. Prior to June 3, 1907, said Kruegel brought three suits in the Forty-Fourth Judicial District Court for Dallas County against the clerk of this court and said Murphy & Bolanz, claiming in each damages because of the refusal of said clerk to issue, after demand, an execution on the judgment first above mentioned, the defendants in said three suits set up and relied upon the judgment in the injunction suit above mentioned and, after trial on the merits, final judgments were rendered against Kruegel in said three cases, but said three cases are now pending in the Court of Civil Appeals on writs of error sued out by Kruegel.

"Fifth. Prior to June 8, 1899, on their own petitions, said J. P. Murphy and Chas. F. Bolanz were duly adjudged bankrupts by the proper United States District Court, and the judgment first above mentioned was duly scheduled by them in said proceedings, and said Kruegel was duly notified and appeared and contested said proceedings, and on said day said J. P. Murphy and Chas. F. Bolanz each and both duly received from said court their discharges in bankruptcy, releasing and discharging them from all their debts and liabilities existing on September 8, 1899, when they were adjudged bankrupts. In 1900 said Kruegel on his own petition was duly adjudged a bankrupt by said United States Court, and one A. W. May was appointed and duly qualified as his trustee in bankruptcy and afterwards said Kruegel received his discharge in bankruptcy."

Conclusions of law.—1. The judgment in cause No. 12634 being

against Murphy & Bolanz, they were most vitally interested adversely to Kruegel in its collection, and the court properly permitted them to intervene and contest the motion to require the clerk to issue an execution for its enforcement. The clerk had no special interest therein, and if there was any reason why the motion should not be granted, the duty of showing that reason very properly fell on Murphy & Bolanz, as they were the ones affected by such proceedings. Smith v. Power, 2 Texas, 57; Eppstein v. Holmes, 64 Texas, 560.

2. After the rendition of the judgment against Murphy & Bolanz in cause No. 12634, they were adjudged bankrupts and were discharged. In said bankrupt proceedings this judgment was scheduled with their liabilities and Kruegel contested their discharge. Their discharge being granted they were relieved from the payment of said judgment and Kruegel has no legal right to have process issued for its enforcement.

3. Kruegel having been adjudged a bankrupt and received his discharge after the rendition of said judgment, the presumption is that the said judgment was scheduled among his assets and the title thereto passed out of him and the same applied to the payment of his debts. It not being shown that it reverted to him at the close of the bankruptcy proceedings, it must be presumed that it was consumed in the settlement of his bankrupt estate, and no right was shown in him to now collect it.

4. Kruegel having been enjoined from requiring the issuance of the execution on the ground that he was not the owner of said judgment by the decree of the Forty-Fourth District Court, which decree was never appealed from, but is still in existence, he is barred from now demanding the issuance of an execution to enforce the collection of said judgment. Kruegel v. Rawlins, 121 S. W., 216; Kruegel v. Rawlins, 124 S. W. (Sup.), 419.

5. There was no error in the court's refusing to allow Kruegel a jury in the trial of this case. Kruegel neither offered to pay the jury fee, nor to make affidavit of his inability to pay it. Besides, the evidence was such that the court should have instructed a verdict for the defendants had the case been tried before a jury, therefore no injury resulted to Kruegel for the want of a jury. Cleveland v. Smith, 113 S. W., 547.

6. It appears that there are three other final judgments denying Kruegel the right to have execution issued on this judgment existing in the District Court of Dallas County, besides three suits involving in one way or another the right to enforce the collection of said judgment against Murphy & Bolanz have been brought and prosecuted to judgment and appealed, in which Kruegel has lost in each instance. It seems that he has had his *day* in court.

The foregoing conclusions of law dispose of the assignments of error, and there being no error shown, the judgment is affirmed.

Affirmed.

Writ of error refused.

R. W. GETZENDANER v. TRINITY & BRAZOS VALLEY RAILWAY COMPANY.

Decided March 5, 1910.

Condemnation—Amendment of Judgment—Jurisdiction.

A County Court would have the power to amend in August a judgment rendered in June before upon the award of commissioners in condemnation proceedings so as to embrace a certain tract of land which, by mistake of all the parties, was omitted from the judgment, and such amended judgment would be a bar to a suit by the original owner for the land omitted from the original judgment.

Appeal from the District Court of Ellis County. Tried below before Hon. F. L. Hawkins.

W. L. Harding and *M. B. Templeton,* for appellant.

Andrews, Ball & Streetman and *Groce & Eskridge,* for appellee.

BOOKHOUT, ASSOCIATE JUSTICE.—This suit was brought to recover ten and sixty-three hundredths acres of land, or, in the alternative, its value and damages, alleged to be $1800. The railway company plead that, prior to April 17, 1906, it was engaged in the construction of a line of railway through Ellis County, and desired to appropriate for right of way purposes two certain tracts of land owned by the appellant, one tract being seven and sixty-one hundredths acres, and the other ten and sixty-three hundredths acres; that it was unable to agree with appellant in respect to the damages; and that on April 17, 1906, it began proceedings for condemnation thereof, intending to condemn both tracts, but in drafting the petition for condemnation only the small tract was mentioned or described; that it does not know why same was left ont, but that the second tract of ten and sixty-three hundredths acres was not mentioned or described, being omitted through error or mistake. The county judge appointed commissioners upon said petition in the usual form, and said commissioners were duly sworn as provided by law to assess damages; that said commissioners, after giving notice, met and proceeded to hear the evidence; that the petition was not read, but that the railway company and the commissioners thereof thought both tracts were included therein, and heard evidence as to both tracts; appellant thought the same thing, was present but filed no pleadings and took no part in the proceedings; that commissioners awarded $925 damages and taxed appellant with cost, as the railway company had offered to pay more than the award; that the commissioners made written report to the county judge in due form, stating that they had assessed the damages to the land described in the petition at $925; that after the expiration of ten days, no objections having been filed, the railway company procured the award of the commissioners to be embraced in a judgment of the court in usual form, and deposited the award with the clerk, which was subsequently turned over to the appellant. The court found the above facts, and further

found that on August 23, 1906, railway company filed in the County Court, Ellis County, its petition setting up the omission of field notes of the ten acre tract of land, and asking the County Court to enlarge or amend its former judgment rendered June 5, 1906, so as to embrace the field notes of both tracts. The appellant was cited to appear, and did appear and plead to the jurisdiction of the court, which plea however was overruled and judgment of County Court rendered, embracing the field notes of the ten acre tract therein.

The trial judge further found that the appellant and his attorneys intended to file exceptions to the award of the commissioners and, within the time allowed by law, prepared to do so; when they, for the first time, discovered the omission of the field notes of the ten acre tract and, for this reason, did not file objections to said award; but after entry of judgment approving said award of the County Court, made June 5, 1906, said railway caused to be deposited with clerk of County Court a check in the sum of $925, which was delivered to appellant; that said appellant had knowledge at the time of the fact that said judgment did not contain the field notes or any mention of the ten acre tract; that he was present at the award, with his attorneys, and filed no pleadings, and knew the commissioners in their award considered both tracts of land; that before the commissioners of condemnation the railway company had offered to pay the appellant seventy-five dollars per acre for said land and, the award being for less than that amount, the appellant was taxed with cost of proceedings amounting to about forty dollars; and that appellant made no representation to the railway company and did not act on his part more than is stated. The County Court amended its judgment so as to make it include both tracts of land, which judgment was upon appeal affirmed by this court. 43 Texas Civ. App., 66 (102 S. W., 161).

In the present case the trial court held that appellant was bound by the judgment of the County Court and that the same was a bar to a recovery in this case. The question presented is: Did the County Court have the power in August, 1906, to amend its judgment rendered in June, 1906, so as to embrace the ten acre tract of land? This question is fully answered in the affirmative in the opinion of this court rendered on the appeal from the judgment of the County Court amending its judgment so as to include both of the tracts of land condemned. We do not think it necessary to add anything to our former opinion. The judgment is affirmed.

Affirmed.

Writ of error refused.

D. T. GARTH v. T. L. CHILDS ET AL.

Decided March 5, 1910.

1.—Practice—Due Order of Pleading.

The answer of a defendant consisted of a general and special exception, a plea to the jurisdiction, and a general denial, all contained on one page and all filed at the same time. A motion to strike out the plea to the jurisdiction on the ground that it was not filed in due order of pleading, was properly overruled.

2.—Jurisdiction—Amount in Controversy.

In the absence of evidence to show, and of a finding, that a plaintiff had alleged the amount in controversy at an amount beyond the jurisdiction of a Justice's Court for the fraudulent purpose of conferring jurisdiction on the County Court, it is the duty of the County Court to render judgment for the amount found to be actually due although it be below the original jurisdiction of that court.

Error from the County Court of Freestone County. Tried below before Hon. John Terry.

Alexander & Hogsett and *D. S. Garth,* for plaintiff in error.

No brief for defendant in error.

BOOKHOUT, ASSOCIATE JUSTICE.—This suit was instituted by D. T. Garth to recover of T. L. Childs and the city of Teague certain attorney's fees alleged to be due him. It was alleged that the city of Teague was duly incorporated and that Childs was its mayor and also its recorder; that plaintiff was city attorney of said city and that by virtue of his office he was entitled to the sum of $210, as fees in seventy-one cases, wherein pleas of guilty were entered in the corporate court and an attorney's fee of $3 was paid and which fine and costs had been paid the said recorder.

The defendants answered by a general and special exception, a plea to the jurisdiction, alleging in substance that if there was anything due plaintiff by the city it was not more than $40 and that he had alleged the amount to be over $200 for the fraudulent purpose of conferring jurisdiction on the County Court. Defendants also plead a general denial.

The case was tried by the court without a jury. The trial court filed conclusions of fact wherein it found, among other findings, that Garth was city attorney; that the city of Teague was duly incorporated under the general laws of Texas; that T. L. Childs was its mayor and ex-officio recorder; that during the time set out in the petition there had been twenty-four cases tried in the recorder's court in which a plea of guilty was entered, upon which judgment had been entered, and the fine and costs paid, including a fee of $3 assessed and collected for the attorney, making a total of $72. The court concluded as a matter of law that there was due appellant as attorney's fees $72. The court being of the opinion that he did not have jurisdiction to render judgment for this amount he dismissed the case for want of jurisdiction.

The answer of defendants consisted of a general and special exception, a plea to the jurisdiction, and general denial, all contained on one page and all filed at the same time. The plaintiff filed a motion to strike out the plea to the jurisdiction because it was not filed in due order of pleading, it being contended that the plea to the jurisdiction was waived by it because filed after the general and special exceptions. The entire answer was on one sheet of paper, and was filed June 3, 1908. It not appearing that the plea to the

jurisdiction was filed after the exceptions, the same was not waived by the fact that the exceptions preceded the plea. (Collin County Natl. Bank v. Turner, 111 S. W., 670.)

The trial court was of the opinion that because the evidence showed that plaintiff's proof only entitled him to recover $72, that the County Court was without jurisdiction to enter judgment for that amount. In this the court erred. There was no finding that the plaintiff had alleged in his petition the amount of the indebtedness due him by defendants at $210 for the fraudulent purpose of conferring jurisdiction on the County Court, nor is there any evidence in the record to support such a finding. In the absence of a finding that the plaintiff alleged the indebtedness to be $210 for the fraudulent purpose of conferring jurisdiction on the County Court, that court had jurisdiction of the case. It was the duty of the court, under the facts, to render such judgment for plaintiff as the evidence authorized, which, as shown, was $72. The judgment will therefore be reversed and judgment here rendered that the appellant have and recover of appellees judgment for $72 with six percent per annum interest from July 20, 1908, the day of trial in the County Court. All costs are taxed against appellees.

Reversed and rendered.

RECEIVERS OF KIRBY LUMBER COMPANY v. WILLIAM LLOYD.

Decided March 7, 1910.

1.—Venue—Tram Road—Lumber Company.

A tram road operated by receivers of a lumber company in the conduct of the business of the company, comes within the purview of the Act of 1901 (Gen. Laws, 1901, chap. 27) concerning the venue of suits against receivers of railroads for personal injuries, and such receivers may be sued either in the county in which the injury occurred or in the county of plaintiff's residence.

2.—Personal Injuries—Charge Approved—No Double Recovery—Cases Distinguished.

In a suit for damages for personal injuries the court charged the jury as follows: "If you find a verdict for plaintiff you will assess his damages at such a sum of money as, if paid in hand at this time, will fairly and justly compensate him for the injuries alleged in his petition which you find from the evidence he sustained, if any; and in doing so you will take into account the mental and physical pain, if any, suffered by him up to this time and that will be suffered by him in the future as a result of said injuries, if any; the earning capacity lost by him on account thereof, if any; and the impairment of his ability to earn money in the future, if any, on account of said injuries." Held, not subject to the objection that it allowed a double recovery for the same result. International & G. N. R. Co. v. Butcher, 98 Texas, 462, and Missouri, K. & T. Ry. Co. v. Nesbit, 40 Texas Civ. App., 209, distinguished.

3.—Res Gestae—Contemporaneous Statements—Effect as Evidence.

Where a plaintiff, in a suit for damages for personal injuries, denied making certain statements under such circumstances as constituted them part of the res gestate, it was error for the trial court to limit by its charge the effect of the testimony of other witnesses, as to the fact that said statements were made, to the impeachment of the plaintiff. Said declarations were evidence of the truth of the facts stated therein.

4.—Practice—Defensive Matter—Right to Submission.

When a matter of defense is properly pleaded and supported by proof, it is error for the trial court to refuse a special charge distinctly submitting the issue to the jury, the issue not being submitted in the main charge.

Appeal from the District Court of Sabine County. Tried below before Hon. W. B. Powell.

Baker, Botts, Parker & Garwood and *Andrews, Ball & Streetman,* for appellants.—The court's charge upon the measure of damage is incorrect in that it allows a double recovery, to wit, the recovery for mental and physical pain, if any, suffered by him up to the time of the trial and that will be suffered by him in the future as a result of the injuries, and the earnings lost by him on account thereof, and impairment of his ability to earn money in the future on account of the injuries. A recovery for future mental and physical pain would include a recovery for future decreased earning capacity. Texas & N. O. Ry. Co. v. McGraw, 43 Texas Civ. App., 247; Missouri, K. & T. Ry. Co. v. Nesbit, 40 Texas Civ. App., 209; Houston & T. C. Ry. Co. v. Anglin, 12 Texas Ct. Rep., 385; Missouri, K. & T. Ry. Co. v. Hannig, 91 Texas, 50; Texas Cent. Ry. Co. v. Brock, 88 Texas, 310; St. Louis S. W. Ry. Co. v. Smith, 63 S. W., 1067; International & G. N. R. Co. v. Butcher, 98 Texas, 462.

The testimony of the witnesses Gibbs, Kelly, Key and Wilson, as to statements made by Lloyd when they reached him immediately after the accident, was part of the res gestae and was original evidence, and not merely impeaching testimony. The charge of the court, therefore, in limiting the scope of this testimony, was upon the weight of the evidence. International & G. N. Ry. Co. v. Anderson, 82 Texas, 519; Texas & P. Ry. Co. v. Robertson, 82 Texas, 660; 11 Ency. Ev., 292, 293, 295, 298, 299; Greenleaf on Evidence, sec. 100, p. 198; id., sec. 162f, p. 263; Hadley v. Carter, 8 N. H., 40; Murray v. Boston & Maine Ry. Co., 54 Atl., 289, 61 L. R. A., 495.

The court erred in refusing special exception No. 10, requested by the defendant, which is as follows: "The jury are instructed that if you find that the plaintiff failed to give any signal to the engineer to slow down the train as the cars neared him, and that in failing to do so, if you find he did, he did not exercise ordinary care for his own protection, and that such failure on his part, if any, caused or contributed to cause said accident and injury then he can not recover; and if you so find the facts, you will return a verdict for the defendants, although you may find the defendants were negligent in backing said train. St. Louis S. W. Ry. Co. v. Hall, 98 Texas, 480; Texas Trunk Ry. Co. v. Ayres, 83 Texas, 269; Dallas Con. Elec. St. Ry. Co. v. Conn, 100 S. W., 1019; Missouri, K. & T. Ry. Co. v. McGlamory, 89 Texas, 639.

Tom C. Davis, E. P. Padgett and *Hamilton & Minton,* for appellee.

REESE, ASSOCIATE JUSTICE.—This is an action instituted in the District Court of Sabine County by William Lloyd against the re-

ceivers of the Kirby Lumber Company to recover damages for personal injuries received by plaintiff while engaged in the discharge of his duties as a brakeman on a logging train operated by defendants on a tram road owned by the lumber company and operated by defendants as receivers, in connection with its business of manufacturing lumber. Upon trial, with the assistance of a jury, there was a verdict for plaintiff, and from the judgment defendants appeal.

According to the allegations of the petition there were several cars loaded with logs standing on the track at the head of a grade, and several other cars, likewise loaded, to which was attached a locomotive in charge of one Kelly as engineer, at the foot of the grade. The immediate work in hand was to couple the latter string of cars onto the former, and to effect this purpose appellee was directed by the engineer to open the switch leading from the track on which the engine and cars attached were standing, to the track on which were the other cars. After opening the switch appellee gave the engineer the signal to back up, and started to the other cars for the purpose of making the coupling. On account of the projection of the logs over the ends of the cars it was necessary to use a heavy piece of timber about nine feet long and five inches square, called a "reacher" or "rooster," to connect the draw-heads of the respective cars. When he reached the standing cars appellee went onto the track and picked up this piece of timber and rested it on his knee so as to be ready to insert it in the draw-head of the approaching car. These approaching cars came back so fast that appellee could not remove the coupling pin, and in order to check the speed of the cars and save himself he placed the end of this piece of timber against the draw-head of the moving car, but the cars were coming so fast and with such force that the timber "bucked" and flew out, knocking him down and falling on him, pinning his leg across the rail, where it was run over by the wheels of the car and crushed. It was alleged that the accident was wholly due to the negligence of the engineer in backing the engine and cars at a high and unnecessary and unusual rate of speed, whereby the appellee was neither able to make the coupling nor to escape from between the cars after he discovered this fact. The accident occurred in Sabine County.

Appellants filed a special plea of privilege to be sued in Harris County, where its principal office was located, which was overruled. They also pleaded, in addition to general demurrer and certain special exceptions, a general denial, contributory negligence and assumed risk.

We find, as conclusions of fact, that the evidence was sufficient to support the verdict on the issue of negligence on the part of appellants, and assumed risk and contributory negligence on the part of appellee, and as to the amount thereof.

The first assignment of error complains of the action of the court in overruling appellants' plea of privilege to be sued in Harris County. This question was certified by this court to the Supreme Court, and by its answer we are advised that the trial court did not

err in the matter complained of. (Receivers, Kirby Lumber Co. v. Lloyd, 103 Texas, 153. The assignment is overruled.

By their second, third and fourth assignments of error appellants assail the verdict and judgment as being contrary to the law and the evidence and without evidence to support the same, and also as being contrary to the overwhelming weight and preponderance of the evidence, in that it was shown that there was no negligence on the part of the engineer, that appellee assumed the risk, and was guilty of negligence contributing to his injury. We have examined the evidence carefully and our conclusion is that these assignments are not well taken. Each of the assignments, and the several propositions thereunder, are overruled.

By the fifth assignment of error complaint is made of the following charge, on the ground that it allows a double recovery for the same damage:

"Under the evidence admitted before you, and the law given to you in this charge and any special charges that may be given, if you find a verdict for the plaintiff, you will assess his damages at such a sum of money as, if paid in hand at this time, will fairly and justly compensate him for the injuries alleged in his petition which you find from the evidence he sustained, if any; and in doing so you will take into account the mental and physical pain, if any, suffered by him up to this time and that will be suffered by him in the future as a result of said injuries, if any; the earning capacity lost by him on account thereof, if any, and the impairment of his ability to earn money in the future, if any, on account of said injuries, together with the amount, if anything, paid by him for doctor's bill and medical attention, as you may find to be reasonable and just."

The ground of objection is that by the charge the jury were allowed to award to appellee damages both for mental and physical pain and for impairment of his ability to earn money on account of his injuries, and that this allowed a double decovery for the same result.

We can not agree to this contention. There might result diminished earning capacity and mental and physical suffering, quite independent of each other. None of the authorities cited by appellants sustain their contention. In the case of International & G. N. Ry. v. Butcher, 98 Texas, 462, the charge complained of allowed damages to be recovered for (1) physical and mental suffering; (2) the probable future effect of the injuries on plaintiff's mental and physical health; (3) impairment of ability to or capability to pursue the course of life plaintiff might have done, and (4) decreased mental and physical capacity to labor and earn money. It was held that the injuries to plaintiff's physical and mental health would necessarily impair his ability to pursue a calling he could otherwise have pursued, and would also decrease his capacity to labor and earn money, and that the decreased capacity to labor and earn money would necessarily be a result of the impairment of physical and mental health. The court is careful not to say that mere mental or physical suffering would necessarily affect the ability to labor and

earn money, which are the only two elements of damage submitted in the charge complained of here.

In Missouri, K. & T. Ry. v. Nesbitt, 40 Texas Civ. App., 209 (88 S. W., 891), the charge was held objectionable on the ground that it allowed a recovery for inability to pursue the course of life which the injured party might have pursued but for his injuries, and also for diminished capacity to labor and earn money. It was held that it was misleading to mention both elements of damage in the charge as distinct from each other. A charge identical with the one here complained of was approved by this court in Lyon et al. v. Bedgood, 54 Texas Civ. App., 19 (117 S. W., 900), and also in Houston Elec. Co. v. Seegar, 54 Texas Civ. App., 225. There is no merit in the assignment.

The sixth assignment of error complains of the following charge:

"The testimony of the witnesses Gibbs, Kelly, Key, Wilson, Doctors Morgan and Fortenberry as to statements made to and in the presence of them or either of them by the plaintiff, Will Lloyd, which statements the said Lloyd denied making, were admitted in evidence before you as impeaching testimony, and will be considered by you in passing upon the credibility of the witness Lloyd; and you will consider it for that purpose and in that connection only."

In so far as the testimony of the witnesses Gibbs, Kelly, Key and Wilson is concerned, it was clearly a part of the *res gestae,* and was admitted as such by the trial court, as shown by the record. This testimony consisted of statements made by appellee Lloyd as he lay on the ground and immediately after the accident, either to or in the hearing of these witnesses, relating to the accident, and tending, if true, to exonerate Kelly, the engineer, of the charge of negligence, and throw the responsibility for the accident upon appellee. It is clear that the statements were made under such conditions as to time, place and circumstances attending them as to bring them within the rule for the admission of such declarations when shown to have been a part of the *res gestae.* This is not questioned by appellee. In such case the declarations of appellee were evidence as to the truth of the facts so stated by him, and they were none the less admissible for that purpose, even if appellee had admitted that he made them, though in such case their exclusion would probably have been harmless error. But in the present case appellee only admitted that he made so much of such statements as discharged Kelly of blame at his hands, and did not at all admit making the statement to Kelly that "I ought to have flagged you—I have made so many of these couplings that I thought I could make this one," in connection with his statement that he did not blame Kelly. It was clearly error to limit the effect of this testimony to the impeachment of appellee, and to tell the jury that they could only consider it in passing upon his credibility. The testimony was important and bore directly upon the vital issue in the case. The assignment must be sustained. (That the declarations were a part of the *res gestae;* International & G. N. Ry. Co. v. Anderson, 82 Texas, 519; Texas & P. Ry. Co. v. Robertson, 82 Texas, 660. As to its legal effect: 11 Enc. of Evidence,

292 et seq.; Pilkinton v. Gulf, C. & S. F. Ry. Co., 70 Texas, 230; McGowen v. McGowen, 52 Texas, 657.)

We are of the opinion that special charge No. 10, requested by appellants, should have been given. Whether the plaintiff was guilty of negligence causing or contributing to his injury in failing to give to the engineer a signal to slow down as the cars were about to come together to make the coupling, was a defense specially presented by the pleadings and there was evidence tending to support it. We can find nothing in the court's charge covering this point, except in the most general way, if at all. The appellants were entitled to have the facts with regard to this presented to the jury and to have the charge requested by them given. (Texas Trunk Ry. Co. v. Ayres, 83 Texas, 269; Missouri, K. & T. Ry. Co. v. McGlamory, 89 Texas, 639; St. Louis S. W. Ry. Co. v. Hall, 98 Texas, 488.) We have examined the other assignments of error, and they are severally overruled without discussion.

For the errors indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

STATE OF TEXAS v. W. J. B. ADAMS.

Decided March 7, 1910.

1.—Taxes—Assessment—Compliance with Statute.

The decisions which require a strict compliance with the law in regard to the assessment of land for taxes in cases of summary sales by the tax collectors by virtue of the tax rolls, should not now control under the law requiring a suit and foreclosure of the lien. If the description given in the assessment is such that by applying it to the land it can be identified, it is a substantial compliance with the requirements of the statute and the tax lien attaches.

2.—Same—Description—Omission of Survey Number.

Under the present law and procedure for the collection of taxes an omission by the tax assessor of the number of the survey will not invalidate the assessment, provided the land can be identified from the entire description.

3.—Appeal—Practice.

A Court of Civil Appeals will not decide a question not raised in the trial court.

Appeal from the District Court of Jasper County. Tried below before Hon. W. B. Powell.

Smith & Blackshear, for appellant.—The assessment is sufficient if the land assessed can be identified by the description given on the roll. Sec. 7, chap. 130, of the Acts of 29th Leg., p. 320; State v. Farmer, 94 Texas, 232; Haynes v. State, 44 Texas Civ. App., 492.

W. W. Blake and *Roi Blake,* for appellees.—The omission or failure to give the number of the survey in making out these rolls, or to state that the number was unknown, is fatal to the validity of the

roll when attempted, as in this case, to operate as a lien in favor of the State for the taxes assessed. Constitution, art. VIII, sec. 15; Rev. Stats., 1879, page 681, arts. 4681, 4683, 4710, 4711; Henderson v. White, 69 Texas, 104; McCormick v. Edwards, 69 Texas, 108-9; Morgan v. Smith, 70 Texas, 641; State v. Farmer, 57 S. W., 84; State v. Farmer, 94 Texas, 232; Clegg v. State, 42 Texas, 605; George v. Dean, 47 Texas, 73; Pfeuffer v. Bondies, 42 Texas Civ. App., 52.

REESE, ASSOCIATE JUSTICE.—This is an action by the State against W. J. B. Adams, as the owner, to recover the taxes due on the Grant and Lator 640-acre survey of land in Jasper County for the years from 1885 to 1895, inclusive, excluding the year 1894, and to foreclose the tax lien. The taxes sued for, with interest, penalties and costs, amounted in the aggregate to $185.14. The case was tried by the court without a jury, and resulted in a judgment for defendant, from which the State appeals.

There is no statement of facts in the record, but the court filed conclusions of fact and law, from which it appears that all the prerequisites necessary to sustain the State's claim for the amount of taxes, penalties, interest and costs, and to establish the lien therefor, had been complied with, with the single exception that in the assessment of the land, which was assessed to "unknown owner" on the unrendered roll, the assessor in describing the land omitted to give the number of the survey. The abstract number and certificate number, the name of the original grantee, the number of acres and the value, were all properly given for each of the years named. The court concluded, as a matter of law, that the failure to give the survey number of the tract rendered the assessment invalid.

The court found that appellee was not the owner of the land at the date of these assessments, but that he acquired the title after the year 1895, paying value therefor, and without other notice of the lien for taxes or that the taxes were not paid than such as was furnished by the assessment rolls made up as aforesaid. It is alleged in defendant's answer that he bought the land at tax sale for the taxes for the year 1894 on the 7th of May, 1895, but there is no finding as to this. It was further alleged in his answer that he bought from the owner May 5, 1905, and received a deed which is attached to the answer. We have stated the only finding of the court as to the purchase of the land by appellee, which, as it is stated to have been after the year 1895, can not be referred to the purchase at tax sale alleged to have been on May 7, 1895, but must be referred to the purchase from the owner on May 5, 1905.

The assignment of error presents the question of the correctness of the conclusion of law of the trial court that the assessment aforesaid did not constitute a valid lien, nor authorize a recovery in this action.

Under former decisions of the Supreme Court it has been repeatedly held that in order to authorize a sale for taxes it is necessary that the law with regard to the assessment of land for taxes must be strictly complied with, and that in the description of the land the

omission to give the number of the certificate or survey, unless there be some reasonable excuse for such omission, is fatal to the assessment. (Henderson v. White, 69 Texas, 103; McCormick v. Edwards, id., 106; Morgan v. Smith, 70 Texas, 641; Pfeuffer v. Bondies, 42 Texas Civ. App., 52, 93 S. W., 221.) These, and other cases to the same effect, all arose in cases of summary sales by the tax collector under the provisions of the statute giving him the right to make such sale by virtue of the tax rolls merely. We are inclined to think that this strict rule should be relaxed in cases of suits for taxes and foreclosure of liens, as stated in Cooper Gro. Co. v. City of Waco, 30 Texas Civ. App., 623 (71 S. W., 619); Burroughs on Taxation, sec. 95, p. 207.

In the case of State v. Farmer, 94 Texas, 232, the court was called upon to decide whether, in a suit for taxes, an assessment was sufficient which only contained as description of the tract, the following: "Owner unknown. Abstract number 560. Original grantee, Thomas Hamilton. Number of acres, 1967. Unrendered, 1067. Value, $10,000." It appeared that there were two tracts of land in that county in the name of Thomas Hamilton as original grantee, each containing the same number of acres, the abstract number of one being 560 and of the other 561. It will readily be seen that from the foregoing assessment it would be impossible to determine to which one of the two tracts it applied, and the court so held, and upon this ground, resting mainly upon the facts that there were shown to be two surveys of the same number of acres and in the name of the same original grantee, the assessment was declared invalid. We are aware that the court is very careful not to lay down a general rule, and to limit the opinion to the facts of that case. The court says: "The construction of the law most favorable to the State is that a substantial compliance would be sufficient to fix the lien for taxes, and, for the purpose of this opinion only, we adopt that as the rule by which the case is to be decided. If the description given in the assessment is such that by applying it to the land it can be identified, it is a substantial compliance with the requirements of the statute, and the lien attached." The court then proceeds to show that the description of the land, for the reasons above stated, did not sufficiently identify the land. While this opinion is not to be regarded as an authoritative settlement of this question of general application, and was not so intended, yet it must be taken as indicating a leaning of the judicial mind in that direction. Otherwise the case would have been decided, as it clearly could have been, upon the naked ground that the assessment did not give either the certificate number or the survey number, the omission of either of which, under the decisions heretofore referred to, would have been fatal to the assessment.

The case of Cooper Gro. Co. v. City of Waco, *supra,* was decided by the Court of Civil Appeals of the Third District. That was a suit by the city of Waco to collect city taxes on land described as lots 1, 2 and 3, block 18, in the city of Waco. We gather from the opinion that the ordinance of that city required the assessment to show the number of the lots and block. The assessment described

the property as follows: "No. 1689. Moore Bros. T. P. Moore, Agt. Store S. 4 & Mary Sts.," giving further the value and the amount of the taxes due. Quoting from Eustis v. City of Henrietta, 90 Texas, 468, the court says: "The general rule which governs in determining the sufficiency of the description of property embraced in an assessment for taxes is that such description is sufficient when it furnishes the means by which the property can be identified from the description itself, or by the use of extrinsic evidence to apply that description to the property." It was held that the description was sufficient.

In the case of Grace v. City of Bonham, decided by the Court of Civil Appeals of the Fourth District (26 Texas Civ. App., 161), there is a similar holding. The suit was for collection of taxes due the city of Bonham on certain property described as follows: "Abstract No. 112. Original grantee, H. Burkhardt. Chas. D. Grace, owner. Situated in the city of Bonham. Acres rendered, 27½," giving valuation. The ordinances of the city required the assessment to show the name of the owner, the abstract number, the number of certificate, the number of survey, the original grantee and number of acres. It will be noticed that although the court says that the assessment made was almost a literal compliance with the ordinances, in fact, it omits both the certificate number and the survey number. The court treats what was said by the Supreme Court in State v. Farmer, *supra,* an authoritative declaration of a principle of general application. The description was held to be sufficient, and writ of error was refused by the Supreme Court.

We think the trial court erred in holding that the assessment was not sufficient.

It is not necessary to decide what effect the Act of April 17, 1905 (Acts 29th Legislature, chap. 130, p. 318), would have if the description of the land in the assessment was insufficient. By section 7 of that Act it is provided that "in all suits to enforce the collection of delinquent taxes where the assessment of any property for any year is invalid by reason of the failure of the assessor to comply with the provisions of law for the description of . . . any tract of land . . . such assessments are hereby validated and are given the same force and effect as if the descriptions . . . were in all respects strictly in compliance with law . . . provided, as to description, that the description given is such as to identify the property." This Act took effect April 17, 1905. According to the allegations of defendant's answer, which might be considered against him, his purchase of the land was on May 5, 1905. If the statute applied, and we see no reason why it should not, at the time appellee purchased, this assessment, if erroneous in the matter of description, had been validated, provided the description given is sufficient to identify the land. As to this we have no doubt. Everything of description required by statute was given except the survey number. It did not appear that there was more than one survey in the name of Grant and Lator, as in the Farmer case. No doubt could exist for a moment as to the land intended to be embraced in the assessment.

Appellee in his brief sets up that in 1895 he bought the land for the taxes due for 1894, and insists that he took it freed from the lien of the State for taxes for preceding years, and asks us to so hold. There is nothing in the record that raises this question. It was not passed upon by the court in the conclusions of law, nor is there anything in the conclusions of fact upon this point that would authorize us to pass upon the question. The court in the findings of fact says nothing about this previous tax sale, so we can not properly pass upon the question.

The judgment of the trial court is reversed, and, upon the findings of fact, which are not attacked by either party, judgment is here rendered for appellant for the amount of taxes, penalties, interest and costs sued for as shown by the statement attached to the petition, and foreclosure of the tax lien as prayed for.

Reversed and rendered.

Writ of error refused.

J. A. OPENSHAW v. MAHALY DEAN ET AL.

Decided March 8, 1910.

1.—Absolute Deed—Mortgage—Foreclosure—Limitation.

R being indebted to O on September 14, 1899, executed to him an absolute deed to several town lots; the deed was mutually understood and intended to be a mortgage; on January 16, 1900, R executed to O a note for the indebtedness and a deed of trust on the same lots to secure the note; afterwards again, a parol sale of the lots was made by R to O in satisfaction of the indebtedness, and O filed his absolute deed for record on August 24, 1904, and went into possession and made permanent and valuable improvements; on August 26, 1904, R executed a deed to the same lots to his daughter; R died on March 18, 1905; in a suit of trespass to try title by the daughter against O for the lots, held (1) that a cross action by O setting up the note and deed of trust and praying for a foreclosure of the lien, filed more than seven years after the maturity of the note, was barred by limitation; (2) upon plaintiff's interposing the statute of limitation defendant had the right to have the trustee sell the lots under the deed of trust, and, upon obtaining a deed from the trustee, to plead by amended answer the title so acquired; and (3) the fact that defendant first sought to have his lien foreclosed by the court would not prevent him from afterwards having the same foreclosed by the trustee's sale, pleading the same.

2.—Trustee's Sale—Death of Grantor—Limitation.

Neither the death of the grantor in a deed of trust nor the fact that the debt is barred by limitation will conclusively prevent the execution of the power to sell given to the trustee.

3.—Debtor and Creditor—Foreclosure of Lien—Adjustment of Equities.

In a suit of trespass to try title wherein the defendant set up title in himself under a foreclosure sale by the trustee in a deed of trust, facts considered and held to require the application of the general principles of equity whereby the creditor should account for the rents received, and have payment of any balance due on the original debt and compensation for improvements made.

4.—Statute of Frauds—Verbal Sale—Possession and Improvements.

When, to take a verbal sale of land out of the operation of the statute of frauds, a party relies upon possession taken and improvements made, it must be shown that such possession was taken and improvements made during the

life of the vendor and under such circumstances as to afford a presumption that he knew of and acquiesced therein; and this rule can not be affected by the fact that the party claiming under the verbal sale had an absolute deed to the premises when it was admitted that the deed was in fact a mortgage.

5.—Practice—Demurrers—Presumption of Abandonment.

When it does not appear from the record that exceptions to pleading were acted upon by the court it will be presumed that they were abandoned and they can not be renewed by objections to evidence when offered.

6.—Vendor and Vendee—Declarations of Vendor—Hearsay Evidence.

Where, in trespass to try title, the defendant claimed the land under a verbal sale to him, testimony as to the declarations of the vendor, not made in the presence of the vendee, to the effect that the vendee was looking after the property for the vendor, that there were no incumbrances on the same and that he had never made a deed to it, was hearsay and inadmissible.

7.—Subsequent Purchaser—Notice of Prior Deed or Incumbrance.

The possession of one claiming land under a verbal sale would be notice to a subsequent purchaser that he claimed title, but possession would not be notice to such purchaser of an unrecorded deed of trust, and the title acquired by foreclosure of the trust deed could not prevail against such purchaser for a valuable consideration without notice.

8.—Mortgage—Future Advances.

When there is no provision in a deed of trust that it shall cover any advances outside of the amount of the note therein named, it can not be made to cover such; but if the note named in the deed of trust was made and intended to cover future advances as well as present indebtedness, then, to the extent of the amount of the note, the deed of trust would cover such indebtedness.

9.—Appeal—Rendition of Judgment—Practice.

When it appears from the record on appeal that appellee's case is not fully or properly developed, and that upon another trial other and competent evidence might be introduced, judgment will not be rendered against him upon reversal of the judgment of the trial court, but the cause will be remanded for a new trial.

Appeal from the District Court of Harris County. Tried below before Hon. W. P. Hamblen.

John G. Tod, for appellant.

Woods & Graham and *Bailey & Morehead,* for appellees.

REESE, ASSOCIATE JUSTICE.—This suit, as originally instituted, was an action in trespass to try title by Mahaly Dean, joined by her husband, to recover lots 7 and 8, block 424, Baker's addition to the city of Houston. Sam Richards was common source of title, plaintiff Mahaly Dean, a daughter of Sam Richards, claiming title under a deed from him dated August 26, 1904.

Defendant disclaimed as to the north half of the lots, and in addition to a plea of not guilty specially pleaded title in himself. The title thus pleaded was as follows: On September 14, 1899, Sam Richards executed to defendant a general warranty deed to the lots, which was filed for record August 24, 1904. This deed was admitted

to be intended by both parties as a mortgage. It is claimed by defendant that after the execution of this deed he made further advances to Richards, and on January 16, 1900, Richards being then indebted to him in the sum of $450, on that date executed to defendant his promissory note in that amount, due in one year, and to secure the same executed a deed of trust on the property in controversy. It does not appear from the statement of facts that this deed of trust was ever recorded. Thereafter, as alleged by defendant, Richards in consideration of said indebtedness made a parol sale of the property to defendant, upon which defendant went into possession and made permanent and valuable improvements, and, under the belief that the aforesaid deed placing the legal title in him, and the parol sale conferred upon him full title, he, on August 24, 1904, had said deed recorded. Defendant prays in the alternative that if the court should conclude that the facts pleaded do not place the title in him, but only constitute a lien upon the property, that the indebtedness secured thereby amounting, principal and interest, to $500, be established as a lien on the property and he prays for foreclosure of his lien.

To this appellee, by supplemental petition, pleaded that the debt, if it existed, was barred by the statute of limitation.

After the filing of this plea by appellee, appellant had the trustee in the deed of trust to advertise and sell the property for the satisfaction of the note for $450, at which sale the property was bid in by appellant and deed executed to him, and thereafter he filed his second amended answer, in which, in addition to all of the matters theretofore pleaded, he set up his title under this latter sale and deed.

Plaintiff by several supplemental petitions denied any indebtedness of Richards to defendant, and pleaded that if there had ever been any such indebtedness it was barred by limitation; and further, that it had been more than paid by the rents of the property. It was alleged that if defendant had ever placed any improvements on the property that such improvements were neither permanent nor of any value, but rather a detriment to the property. With regard to the claim of title under the trustee's sale and deed, it was alleged that defendant by seeking to have foreclosure of his lien under said deed of trust had elected his remedy and could not thereafter have a sale made by the trustee.

The pleadings are very voluminous. We have only attempted to set out in this statement such features thereof as are material to the decision of this appeal.

Upon the conclusion of the evidence the trial court instructed the jury to return a verdict for plaintiff, and from the judgment thereon defendant appeals.

It is stated in the brief for appellant that it was held by the trial court that having elected to seek by cross-action a foreclosure of the lien given by the deed of trust to secure the note for $450 due January 16, 1901, appellant had elected to pursue that remedy and could not thereafter seek the remedy of foreclosure by sale by the trustee. Unless this view was taken by the court we are unable to see why these facts should have been regarded as presenting no

defense to the suit. The facts as shown by the pleadings are that when appellant set up the fact of the execution of the note and deed of trust, and prayed in the alternative that if the parol sale in connection with the absolute deed, which was intended as a mortgage, did not convey title, the lien of the deed of trust be foreclosed, he was met by a plea that the note was barred by the statute of limitation. This defense to the foreclosure was clearly good. It was then that appellant had the sale made by the trustee and became the purchaser at the sale, which title he then set up by a subsequent amended answer.

It is quite true that appellant could not have both remedies, and that is the effect of the cases cited by appellees in support of their contention on this point. (Cameron v. Hinton, 92 Texas, 492; Avery & Sons v. Texas Loan Agency, 62 S. W., 793.) The facts here present a different case. Appellant, seeing the remedy by foreclosure barred to him by appellees' plea of limitation, substantially abandoned that and sought the other by trustee's sale. In such case he would not be barred of the latter remedy. This we take to be the effect of the decision by our Supreme Court in Converse v. Davis, 90 Texas, 462, when read in connection with Davis v. Andrews, 88 Texas, 524.

Sam Richards having conveyed the property by his deed to appellee, the fact of his death did not deprive the trustee of the power to sell. (Rogers v. Watson, 81 Texas, 400; Phillips v. Watkins, 90 Texas, 195; Taylor v. Williams, 101 Texas, 388.) Nor did the fact that the debt secured by the deed of trust was barred by limitation prevent the execution of the power to sell given by the trustee. (Goldfrank & Co. v. Young, 64 Texas, 432; Fievel v. Zuber, 67 Texas, 275.) The distinction between a remedy provided by contract of the parties and one to be pursued through the process of the courts, is clearly pointed out in Fuller v. O'Neal, 82 Texas, 417.

If any part of the indebtedness to secure which the deed of trust was given remained due at the date of the sale by the trustee, we can see no reason why such sale could not have been made, nor why it did not pass to appellant such title as Sam Richards had at the date of the execution of the trust deed. (Groesbeck v. Crow, 85 Texas, 200.)

The deed of trust does not refer to any other indebtedness than the $450 evidenced by the note, nor is it alleged that as to the deed of trust any other or future advances should be included therein, and it could not be shown that it was agreed that other indebtedness in addition to this should be secured thereby.

We are inclined to think, however, that under the peculiar facts of this case appellees should be allowed, under appropriate pleadings, to pay what may be found to be due, if anything, on the debt secured by the deed of trust, charging appellant with the rents, if any, while in possession, and crediting him with value of permanent improvements, if any, on general principles of equity in such cases. It follows from what we have said that the learned court erred in instructing a verdict for appellees, as appellant testified that there was $125 or $150 still due on the indebtedness.

As to the title under the parol sale, this was eliminated by the refusal of the trial court to permit appellant to testify to the facts alleged as to this, that is, as to the alleged verbal sale and the possession and improvements made thereunder. To this testimony, when offered by appellant, appellees objected on the grounds, as shown in the bills of exceptions, as to the verbal sale, that appellees were purchasers without notice thereof, and the same was in contravention of the statute of frauds; and as to the possession and improvements thereunder, that appellees had no notice thereof; that appellant had not by his pleadings put plaintiff on notice as to what improvements had been placed on the property, in that the allegations of his answer in this regard were too general, and because the pleadings had not shown that the improvements had been made before the death of Sam Richards. These objections were sustained, to which ruling appellant took bills of exception.

We think this ruling was error. By their supplemental petition appellees excepted to the allegations of the petition as to these matters on the grounds that the improvements were not specifically set out, and also that they were not shown to have been made before Sam Richards' death. No ruling was had upon these exceptions, and we must assume that they were abandoned.

The allegations as to the improvements are sufficiently specific. It is true that when a party relies upon possession taken and improvements made under a verbal sale of land to take such sale out of the operation of the statute of frauds, it must be shown that such possession was taken and improvements made during the life of the alleged vendor (Ann Berta Lodge v. Leverton, 42 Texas, 21; Hutcheson v. Chandler, 47 Texas Civ. App., 124), and under such circumstances as to afford a presumption that he knew of and acquiesced therein, and it may be that the special exception to the petition on this ground should have been sustained, but the exception having been abandoned, we do not think that it was proper to renew the same by way of objection to the evidence. Such practice has been often condemned by the courts. In determining the effect of this evidence in taking the verbal sale out of the operation of the statute of frauds, the general rule as to possession and improvements is not affected by the fact that appellant already had a deed from Richards on its face conveying the legal title, but in effect by agreement of the parties only a mortgage. His rights under the alleged verbal sale would depend upon the facts as to possession and improvements made during the life of Richards and presumably with his knowledge and acquiescence, uneffected by the fact that he had the deed which was in effect a mortgage. (Clitus v. Langford, 24 S. W., 325.)

We know no rule of evidence under which the testimony of appellee, Mahaly Dean, and Moorehead should have been admitted as to statements made to them by Sam Richards to the effect that appellant was looking after the property for him, that there were no encumbrances on the property, and that he had not made a deed to it. These statements come under the ordinary rule as to hearsay testimony, and were not admissible. The question is presented by the tenth and eleventh assignments of error, which we would not

consider for the purpose of reversing the judgment, as the statement thereunder is wholly insufficient, being in fact an argument and not such a statement from the record as would enable us to determine the question raised by the assignment. The proposition under the assignment also fails to reach the real point of objection. We only pass upon the question in view of another trial. We take occasion to remark that none of the statements in the brief under the several propositions, are as clear, full and specific as they should be, and the fourth assignment has no statement at all, and for that reason has not been considered. Appellant has filed a supplemental brief in which he has undertaken to cure some of the defects in his original brief, but even with that, the statements from the record of such matters as relate to the questions raised, are not clear nor specific. The questions decided are, however, we think, sufficiently presented to enable us to determine the several objections raised.

Appellant can have no relief except such as may be predicated upon the parol sale alleged to have been made after the execution of the deed of trust, or failing that, the sale and conveyance by the trustee, resting upon the existence of indebtedness at the time of such sale. Of all other remedies he is barred by the statute of limitations.

The possession of appellant at the date of the execution of the deed to appellees, if he was then in possession, would be notice of his title under the parol sale, if such sale is established, as it was under this sale that he claimed title. But this possession would not be notice to appellees of the deed of trust, and appellant's title under the deed of trust could not be sustained if the deed to appellee was upon valuable consideration, that is, such consideration as stated in her pleadings, and she had no notice at the date of its execution of the existence of the deed of trust.

For the errors indicated the judgment is reversed and the cause remanded.

ON MOTION FOR REHEARING.

We apprehend, from appellees' motion for rehearing, that we did not make ourselves clearly understood in our opinion upon one feature of this case. The deed of trust executed by Sam Richards to Openshaw is given to secure a promissory note for $450. There is no provision that the deed of trust shall cover any future advances outside of the note, and it can not be made to cover such. If, however, at the time the note for $450 was given, Richards did not owe Openshaw that amount, and it was agreed that the note should be given to secure what he did owe and also such future indebtedness as was then contemplated would afterwards accrue, up to $450, then to the extent of the amount of the note the deed of trust would cover such indebtedness. Our understanding of the evidence of appellant on this point, however, is that it did not tend to show any agreement as to future advances to be secured by this deed of trust, but that the deed first executed by Sam Richards, which was intended as a mortgage, was to secure a present existing indebtedness and also future advances, and that the entire indebtedness thus secured

amounted, at the date of the deed of trust, to $450, for which the note and deed of trust were then given.

On his motion for rehearing appellant insists that the judgment should have been rendered here in his favor, on the ground that the undisputed evidence showed an indebtedness secured by the deed of trust still due and unpaid at the date of the sale under the deed of trust. He overlooks the testimony, improperly admitted it is true, as to what Sam Richards told the witnesses, in substance, that he owed nothing to Openshaw. Appellees should not be cut off, by a rendition of the judgment here, from the opportunity to prove this fact by other and unobjectionable evidence. Possibly they rested upon this testimony to the neglect of other evidence which may be accessible to prove this fact. We can not assume that there is no legal evidence of the fact, which would have been forthcoming but for the erroneous admission of the evidence referred to.

With this addition to our opinion both motions for rehearing are overruled.

Reversed and remanded.

T. A. GOSE v. R. R. CORYELL.

Decided March 9, 1910.

1.—Nuisance—Abatement—Evidence—Value of Property.

In an action to abate the operation of a cotton gin as a nuisance to plaintiff, a resident on an adjoining lot, it was proper for defendant to prove the value of his plant. The question of right to abate was one of reasonable use of property, and the comparative injury to plaintiff by its continuance and to defendant by its discontinuance was material.

2.—Nuisance—Acquiescence—Estoppel.

One is not estopped from seeking the abatement of a nuisance (the operation of a cotton gin adjacent to his residence and interfering with its enjoyment by dust and lint thrown thereon and by noise and vibration of machinery) by the mere fact that he has permitted such operation for years without objection. To constitute estoppel his conduct must have induced the defendant to alter his position, to his prejudice in the event of abatement.

3.—Same—Prescription.

The right to maintain on one's property a nuisance injuring that of an adjoining proprietor is not acquired merely by its long continued maintenance without objection. Prescription is applicable to rights exercised upon the property of another, not on that of the person relying on it. It would not begin to run until the maintenance of the nuisance injuriously affected the adjoining proprietor's use of his property, as where the latter built and occupied a residence thereon, the use of which was interfered with.

4.—Same.

Findings of fact in an action to abate a cotton gin as a nuisance to the resident on an adjoining lot held not to show estoppel by plaintiff or the acquiring of a right in defendant by prescription to maintain the nuisance.

5.—Practice on Appeal—Remand.

The maintenance of a cotton gin being adjudged a nuisance by the findings of the court, but recovery erroneously denied on the ground of estoppel of plaintiff and acquirement of a right by prescription by defendant, the court,

reversing the judgment, decline to render in favor of plaintiff on the findings, remanding the case for trial on the issue of what would constitute an abatable nuisance under the principles here announced on that subject.

6.—Nuisance—Cotton Gin—Abatement—Reasonable Use of Property.

The fact that the maintenance of a certain industry, such as the ginning of cotton, on the premises of the proprietor, inflicts injury upon an adjoining lot owner in the enjoyment of his residence, will not, alone, give him the right to have such industry abated as a nuisance. The question is one of reasonable use of one's own premises; all the circumstances are to be considered, including the nature of the locality as industrial or residence property, the possibility of finding a more appropriate location and the comparative injury to either by continuance or abatement respectively.

Appeal from the District Court of San Saba County. Tried below before Hon. Clarence Martin.

Matt F. Allison and *N. C. Walker*, for appellant.—The trial court having found the operation of defendant's gin constituted a nuisance, erred in not rendering judgment for plaintiff enjoining its operation. Rhodes v. Whitehead, 27 Texas, 304; Belton v. Baylor Female College, 33 S. W., 680; Faulkenbury v. Wells, 28 Texas Civ. App., 621; Sayles' Texas Civ. Stats., art. 451; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S., 659; Platt Bros. v. Waterbury, 72 Conn., 531, 48 L. R. A., 691; Bloomington v. Costello, 65 Ill. App., 407; Litchfield v. Whitenack, 78 Ill. App., 364; Palestine Bld. Assn. v. Minor, 86 S. W., 696; Over v. Dehne, 75 N. E., 666, first sentence of second column.

Where there is a material change in a location and character of a cotton gin which constitutes it a nuisance to the comfortable enjoyment by owner of property in close proximity thereto, a prescriptive right to operate a gin in the old location constitutes no defense. Bareham v. Hall, 22 Law Times Rep. (N. S.), 116; Simpson v. Seavey, 8 Me., 109; 29 Cyc., 1207, sec. 4; Blackford v. Heman Const. Co., 112 S. W., 290.

Limitation or prescription does not begin to run until there is actual actionable injury, either to the freehold or to the comfortable enjoyment of the property for the purpose of a home. Janesville v. Carpenter, 20 Am. St. Rep., 123; Galveston, H. & S. A. Ry. Co. v. Miller, 93 S. W., 179; Simon v. Nance, 45 Texas Civ. App., 480; 1 Wood on Nuisance, 3d ed., secs. 3, 513; 2 Wood on Nuisance, 3d ed., secs. 640, 708, 709, 712, 713, 714, 715, 719; 2 Thompson on Trials, 1392, sec. 1910; Campbell v. Seamen, 20 Am. Rep., 577; Hurlbut v. McKone, 3 Am. St., 21; Chessman v. Hale, 31 Mont., 577; Fremont, E. & M. V. Ry. Co. v. Harlin, 36 L. R. A., 422; St. Louis, I. M. & S. Ry. Co. v. Biggs, 6 L. R. A., 804; Over v. Dehne, 75 N. E., 664.

Where a right is violated, the law will not balance conveniences. Faulkenbury v. Wells, 28 Texas Civ. App., 621; High on Injunctions, sec. 746; 1 Wood on Nuisance, 3d ed., secs. 512, 555.

Leigh Burleson, for appellee.—It is well established that a person may acquire by prescription the right to maintain a private nuisance.

The modern doctrine is that it is sufficient to establish a right by showing a user of twenty years, or rather for such a period of time as is fixed by the statute in the several States of this country for the acquisition of title to real estate by adverse enjoyment. Wood on Nuisance, 3d ed., 909; 29 Cyc., 1206-7; 21 Am. & Eng. Ency. Law, 755, and cases cited; Baker v. Brown, 55 Texas, 378; Haas v. Choussard, 17 Texas, 588; Mueller v. Fruen, 30 N. W., 886; Bunten Co. v. Chicago, R. I. & P. Ry. Co., 50 Mo. App., 414; North Point Irri. Co. v. Utah Canal Co., 67 Am. St. Rep., 617; Totel v. Bonnefoy, 5 Am. St. Rep., 570; Wright v. Moore, 82 Am. Dec., 731.

KEY, CHIEF JUSTICE.—T. A. Gose instituted this suit against R. G. Coryell, for the purpose of enjoining and preventing the operation of a cotton gin. The plaintiff alleged that great quantities of noise, dust and lint emanating from the gin invaded his home, which is nearby the gin, and caused such discomfort and injury to himself and family as rendered the operation of the gin where it is located a nuisance.

The defendant's answer embraced a general demurrer, a general denial and a special plea of limitation or prescription.

The case was submitted to the court without a jury, and from a judgment for the defendant the plaintiff has appealed.

The trial judge filed the following conclusions of fact and law:

"1. I find that in the early part of the year 1885 John H. Beveridge purchased the land upon which the gin in controversy is situated in the town of San Saba, San Saba County, State of Texas; that shortly after the purchase of said land he began the erection of and established thereon a cotton gin run by steam for the purpose of ginning cotton; that said gin was completed during said year and commenced its operation by steam of ginning cotton that same year.

"That said gin was operated continuously, openly and uninterruptedly during a portion of each succeeding year thereafter up to the time that the same was purchased by the defendant, R. G. Coryell, in this case, some time in the year 1906; from the time of the erection of said gin by the said Beveridge in the year 1885 it was operated by the same steam power during each succeeding year up until the time the defendant took possession of the same to operate it for the same purpose. For more than twenty years prior to the time the defendant purchased said gin from the said Beveridge it had been operated upon the same block, No. 29, in the town of San Saba; that it had been operated by the said Beveridge and those to whom he had leased the same and run continuously, openly and uninterruptedly during each and every year from the time of its erection, with the possible exception of a small portion of the cotton ginning season of 1905 and 1906, on account of the short cotton crop that existed during those years and on account of the sickness of the said Beveridge, but said gin was run a portion of each of said last two mentioned years in the same manner as theretofore and as long as there was any cotton upon the market to be ginned. After the purchase of said gin by the defendant from the said

Beveridge in the year 1906 he took out the old gin stand and a portion of the machinery of said gin and installed in their place new and improved machinery of the latest make; that he put in it a new press in place of the old one that had before stood in the old gin, but he did not enlarge the output or capacity of said gin; operating ever since the same number of gin stands that had been operated by the said Beveridge for more than twenty years theretofore. From the time of the erection of said gin in 1885, the dust, lint, dirt and noise and vibrating from said gin were scattered over, heard and felt all over the portion of the lot upon which the plaintiff afterwards erected his dwelling-house and for more than twenty years before plaintiff erected said dwelling-house and moved his family thereto. I find that this dust, lint, dirt, noise and vibration was scattered over, reached to and heard on this land for more than twenty years before plaintiff erected any dwelling-house thereon and before he purchased the land upon which he erected his residence and before he moved his family thereon. I also find that when this gin was first installed that there was more dust, lint, dirt, noise and vibration than there was at a later date; that the dust, lint, dirt, noise and vibration was greater when it was first erected than at any date since said time; that as improvements were placed on said gin property from time to time that it had a tendency to decrease the amount of dust, lint and dirt that was thrown out from said gin and decreased the amount of noise and vibration that was heard and felt upon the property where the plaintiff's residence was subsequently erected, and that the improvements that were put in said gin from time to time had the tendency to decrease annually the amount of the dust, dirt and lint that was scattered over said property now owned by plaintiff, and the amount of noise and vibration that was heard and felt on said property; and no time since the erection of said gin in 1885 was the amount of dirt, dust, lint that was scattered over said property now owned by the plaintiff from said gin, and the noise and vibration that was heard and felt thereon at any time, increased, but from the time of the erection of said gin in 1885 the same was gradually decreased. That about 1890 said Beveridge added a fan for taking care of the dust, dirt and lint and during the entire time the gin was operated by said Beveridge the dust, lint, dirt and vibration were all greater than at present and as the gin is now operated by the defendant, and that the fan placed in said gin in 1890 by said Beveridge did not increase the amount of dust, dirt or lint scattered over said property of the plaintiff or increase the noise and vibration to be heard on said premises. I find that all this dust, dirt and lint, noise and vibration affected lots 4 and 5 now owned by plaintiff and upon which his residence is situated in excess of what they do now for more than twenty years prior to the purchase of same by plaintiff.

"I further find that for more than twenty years prior to the institution of this suit, with the knowledge and acquiescence of John H. Brown, who owned lots 4 and 5 now owned by plaintiff and upon which his residence is erected and where he lives with his family, the said John H. Beveridge operated said gin and sent more lint,

dirt and dust over said lots and made more noise and vibration that affected said lots than has ever been made by the defendant in the operation of said gin since his purchase of the same and since the installment by him of modern improved machinery, and I find that from the erection and operation of said gin in 1885, said dust, dirt, and lint, and noise and vibration affecting plaintiff's property was never increased any year, but the same was gradually decreased as affecting the property in question. I find that in December, 1905, plaintiff built his house on said lots and soon thereafter moved into said residence with his family; that at the time plaintiff erected said house and at the time he moved his family thereon, he knew that the cotton gin in question and near his said residence had been for more than twenty years, used for the purpose of operating the said gin belonging to the said Beveridge and to this defendant; that said gin was standing upon the said property in the same condition that it was when owned by the said Beveridge and in the same condition in which it had been operated as a cotton gin, throwing out dust, dirt and lint over the property upon which plaintiff had erected his dwelling, and causing the noise and vibrations which affected said property whereon plaintiff had erected his said dwelling-house, and that there was nothing that showed or tended to show that said gin business would be discontinued; and that with said knowledge and with said gin in full view of the property whereon plaintiff erected his said residence he proceeded and did commence and complete said residence, moved therein with his family with full knowledge of all the facts aforesaid.

"I further find that that portion of the town of San Saba in which said gin is located is occupied by manufacturing enterprises of many different kinds, and that the residence portion of said town is to the west of the public square and has moved west and south from the locality where said gin is erected. I find that in said locality and immediately surrounding the property of this plaintiff is a grist mill, a buggy factory, a machine shop, the county jail, a sawmill for the purpose of sawing up cord wood, another cotton gin and a laundry, all of which had been previously erected and were in operation at the time plaintiff erected his residence on said lots. That none of this property, to wit: the woodsaw and steam laundry is immediately adjoining on the property upon which the plaintiff erected his said residence and that said machinery was in operation at the time his said residence was erected, and both said woodsaw and steam laundry, which make considerable noise and emit steam and smoke, were owned and operated by the plaintiff in this case. That the others above mentioned are operated by steam and other engines emitting steam and smoke and make noise in that portion of the town.

"I find that the property purchased by the defendant from said Beveridge, to wit: the said gin and the lots on which the same is situated, is worth at the time of the institution of this suit about $4500 or $5000, and that plaintiff had offered his property for sale, residence, sawmill and steam laundry all for $1800.

"I find that at the time of the improvements of said property by the defendant, that the plaintiff was present, knew of the erection

thereof, made no protest or complaint whatever to plaintiff as to his operating said gin, and at one time that plaintiff assisted said defendant in the mending of some gin belts for the purpose of operating said gin. I find that the new machinery placed in said gin by the defendant has caused a great decrease in the amount of dust, dirt and lint that is thrown over plaintiff's land and a great decrease in the amount of noise and vibration that was heard and felt upon said land compared to that which was caused by the Beveridge gin; that all of said things have been materially decreased from what they were when the gin was operated by the said Beveridge for more than twenty years prior to the time that defendant purchased the same.

"I further find that the amount of dust, dirt and lint sent from said gin over the land where plaintiff's residence is erected and the noise and vibration affecting the same are of such nature and have been for more than twenty years, as to prevent the comfortable enjoyment of the premises as a home. I further find that much of the dust thrown on plaintiff's premises is blown there from the public road near his home caused from excessive travel over the same.

"From the foregoing findings of fact I deduce the following conclusions of law:

"1. That by the continued, adverse, uninterrupted and peaceable operation of the said gin by the said Beveridge and his lessees for more than twenty years prior to the time plaintiff purchased the lots upon which he erected his dwelling and moved his family thereto, and the defendant purchasing said property by general warranty deed from the said Beveridge, conveying to him all of said property, together with all rights and appurtenances thereto in anywise belonging, that defendant has a right by prescription from said uninterrupted, peaceable and adverse operation of said property to operate said gin, plaintiff and his warrantors having acquiesced in the operation of the same for said period of time, and is estopped from asserting any complaint against the same.

"2. I further conclude that the operation of said gin by the defendant, as affects the property of plaintiff, is of a character to constitute a nuisance which could in part be abated had it not been for defendant's right to operate the same by his long continued, adverse, uninterrupted and peaceable operation of the same for more than twenty years prior to plaintiff's purchase of the property upon which his residence is situated."

Opinion.—There is one assignment of error which complains of the action of the trial court in allowing appellee, over appellant's objection, to prove the value of his property. While authorities may be found which hold otherwise, others, resting upon sounder reason, hold such testimony admissible. The right to relief by injunction against a nuisance is not an absolute right, but one resting in the sound discretion of the court; and, for that reason, and in order that such discretion may be wisely and justly exercised when it is sought to prevent an owner of property from using it in a lawful manner on account of injury alleged to result from such use to an adjoining proprietor, we think it is eminently proper to consider

the amount of capital which the defendant has invested in the plant or thing complained of.

By and under the other specifications of error it is urged that, as the trial court found that the operation of the gin constituted a nuisance, judgment should have been rendered awarding the plaintiff relief by injunction. And the further contention is made that the reasons assigned by the trial judge for refusing such relief embody mistaken views of the law. Though in one place in his conclusions of law the trial judge states that appellant is estopped, that statement seems to be incidental to, if not a part of, the conclusion of law which holds that the doctrine of prescription is applicable and bars appellant's right to any relief. At any rate, neither the findings of fact nor the testimony show the existence of one fact essential to constitute an estoppel in pais. In order to constitute such an estoppel it must be shown that the matters claimed to constitute an estoppel have, in some material respect, influenced the conduct of the party invoking the estoppel. In this case it is not shown that the silence and failure to protest on the part of appellant and those under whom he claims, caused appellee or his vendors to pursue the course which was pursued by them. While there is much confusion and some conflict of authority upon the subject, we are of opinion that prescription is not available as a defense in this case. Treating the subject of prescription when invoked in behalf of the right to maintain a nuisance, a standard law writer says:

"There is a distinction between a prescriptive right to do some act upon one's own premises that operates injuriously to another, and a right to do some act upon another's premises. In the latter case each act of user, before the user ripens into a right, is a trespass, for which an action may be maintained at any time, while in the former no action can be maintained until some right has been invaded. In the one case there is an actual invasion of the property itself, while in the other there is a mere invasion of some right. Therefore it will be seen that while in the one case proof of the adverse user for the requisite period may be comparatively easy, in the other it is always attended with great difficulty, and in some instances might be actually incapable of proof. The rule is, and it is important to be remembered, in view of the doctrines that will be announced hereafter, that to constitute an adverse user requisite to sustain the right, it must be shown that the user had actually invaded the right of the person against whom the claim is made, in reference to the particular matter which is the subject of complaint, and that the user, during the entire statutory period, and the invasion of the right, has produced an injury equal to, and of the character complained of, and of such a character and to such an extent that at any time during that period an action might have been maintained therefor." (2 Wood on Nuisances, sec. 708.)

In the case at bar the acts and things alleged to constitute prescription were not done upon appellant's premises, and until he established his home and placed his family upon those premises, he sustained no injury, unless it was a depreciation in the value of his lots. For these reasons we hold that the doctrine of prescription is

not available as a defense; but, at the same time, we are of opinion that the facts and circumstances relied on as constituting prescription, as well as those bearing upon the question of estoppel, are pertinent and proper to be considered in determining whether or not, in the exercise of sound discretion, relief by injunction should be granted.

In Rainey v. Red River, T. & S. Ry. Co., 99 Texas, 276, an injunction was sought to prevent the railway company from maintaining its yards, coal bins, roundhouses, machine shops, etc., in close proximity to the plaintiff's residence. That was a nuisance case, and the jury having returned a verdict which the Supreme Court treated as equivalent to a finding that the matters complained of constituted a nuisance, that court reversed the judgment of the trial court in favor of the defendant. On the authority of that case we have reached the conclusion that it is our duty to reverse this case; and, as was done in that case, remand the cause for another trial. We are not unmindful of the general rule that, when there is a special verdict or findings of fact filed by the judge, and no error has been committed other than rendering judgment for the wrong party, the Appellate Court when it reverses a case, will render the judgment which should have been rendered. That course was not pursued in the case just cited, and it will not be pursued in this case, because the judge's conclusions of law indicate that if he had not fallen into error as to prescription he would not have granted all the relief sought, and it is not shown how much relief he would have granted. Furthermore, it is highly probable that additional testimony can be produced for the purpose of aiding the court in determining whether or not any relief by injunction should be granted. And still furthermore, the court made no finding as to the reasonableness of appellee's conduct in doing the things complained of—which is an important issue in the case.

For the guidance of the court below we deem it proper to give expression to our views, in a general way, in cases of this class. The courts are practically unanimous upon the proposition that persons who live in cities, towns or villages must of necessity submit to the consequences resulting from the occupations and pursuits carried on in the immediate neighborhood which are lawful and necessary for trade and commerce; and matters which, although in themselves annoying, are in the nature of ordinary incidents of city or town life can not be abated as nuisances. It has also been frequently declared that one who uses his property in a lawful and proper manner is not guilty of a nuisance, merely because the particular use which he chooses to make of it may cause inconvenience or annoyance to a neighbor. But the lawfulness of the act, use or business is not the sole test, and that which is not otherwise unlawful may constitute a nuisance by reason of the surrounding circumstances and the result which it produces. Also, while authorities may be found tending to the contrary, the better considered cases and the weight of authority are to the effect that in cases of this kind locality is to be considered in determining whether there is a nuisance, and if so, whether relief should be awarded by injunction or the injured party restricted to an action for damages, for what might constitute a nuisance in one

locality might not be so in another. It has been held that a business which might be proper in a business or manufacturing neighborhood may be a nuisance when conducted in a residential district; and, on the other hand, a business which with its incidents might well be considered a nuisance in a residential section of a city or village, may not be subject to such complaint where conducted in a business or manufacturing locality. (29 Cyclopedia of Law and Procedure, 1157, 1159.)

The valuable authority just cited states this as a correct rule: "A fair test as to whether a business lawful in itself, or a particular use of property, constitutes a nuisance is the reasonableness or unreasonableness of conducting the business or making the use of the property complained of in the particular locality and in the manner and under the circumstances of the case; and where the use made of his property by the person complained of is not unreasonable it will not as a rule be enjoined, nor can a person complaining thereof recover damages. But when it is established that a person is creating a nuisance the mere fact that he is doing what is reasonable from his point of view constitutes no defense."

Our own Supreme Court in Gulf, C. & S. F. Ry. Co. v. Oakes, 94 Texas, 155, in a strong and well considered opinion by Mr. Justice Williams, dealt with the perplexing problem of the relative rights of adjacent owners to use their respective premises in a lawful manner, and whether or not in so doing one owner might become liable for damages to the other. In that case the defendant had planted Bermuda grass on its right of way, and, without negligence on the defendant's part, the grass in a natural way, had spread on to and injured the plaintiff's land. The Supreme Court held that if the defendant was not guilty of negligence, the plaintiff had no cause of action; and, in the course of the opinion, it was said:

"It is a general principle of law that the owner of property may use it as he chooses, in any lawful way; but another maxim, in general terms, requires him to so use it as not to injure another. The application of these principles give rise to some of the most difficult questions and delicate distinctions known to the law. Bishop concisely states the general doctrine thus: 'One may not, either voluntarily or negligently, cast earth or other substance from his own ground on a neighbor's; or upon his own bring or erect anything, or change the natural position of anything, from which the air, the moving water, or any other force of nature will bear to another on other land what is distinctly injurious to him; or by any excavation, structure or other change of his premises from their natural condition, render them unsafe to other persons and their property lawfully thereon; while yet these restraints will not be drawn so closely as substantially to deprive him of the use of his lands, or the ordinary pursuit of his own interests or to render him answerable for the inevitable accidents injuring others.' Non.-Con. Law, sec. 829.

"Since the owner may use his land as he chooses, if he does not violate any law, and is not to be substantially deprived of its use or of the ordinary pursuit of his own interests, but at the same time is required in its use to avoid injury to another, it at once follows

that he may be required to forego a particular use when it is not essential to the substantial enjoyment of his property and is fraught with unreasonable loss to his neighbor. On the other hand, the particular use may be so important to the owner and the loss or inconvenience to his neighbor so slight, compared to his, were he forbidden to so employ his property, that it would be unreasonable and unjust to impose such a restriction. In such cases it is evident that all of the circumstances of the situation must be taken into consideration, the importance of the use to the owner as well as the extent of the damage to be inflicted upon his neighbor, and the rights of the parties are to be adjusted in a practical way, the question being whether or not the proposed use is a reasonable one under all the circumstances. 1 Wood on Nuisances, 3; Bishop on Non.-Con. Law, secs. 418, 842. We are unable to discover that the law does, or, from the nature of the subject, can furnish a more definite rule. For this reason we think it can not be laid down as a rule of law applicable to all circumstances and situations that one who plants Bermuda grass upon his premises makes himself liable for any damage that may result to his neighbor; nor, on the other hand, that he may not be liable under some circumstances and conditions. As is said in some of the authorities, there must, in such inquiries where rights and interest seem to conflict, be a balancing of them."

Though not specifically so designated by our Supreme Court, that was a nuisance case and is so treated by the editors of the American State Reports, as shown by the syllabus under which it is reported in vol. 86, p. 835. And in Rainey v. Railway Co., supra, the same court in recognizing the doctrine that injunction is not an absolute remedy for a nuisance, said:

"So that in any case, when the company is enabled to show a reasonable necessity for the location at the particular point, or that no other eligible place can be found where a similar injury would not be inflicted upon another person or persons, an injunction should be denied and the party remitted to his action for damages. So if the injury be small and capable of being estimated in money and a money payment is an adequate compensation, and the injunction would operate oppressively to the defendant, then it may be that it would be proper to refuse to enjoin. (See remarks of Lord Justice A. L. Smith in Shelfer v. Electric Light Company, 1895, 1 Chan., pp. 321-323.) However, we would not be understood as laying down any fixed rules upon this point, but as merely throwing out some suggestions which may be useful in the final determination of the rights of the parties."

(See also Joyce on Injunctions, sec. 1067; Richard's Appeal, 57 Pa. St., 105, 98 Am. Dec., 202; Huckenstine's Appeal, 70 Pa. St., 102, 10 Am. Reps., 669; Ballentine v. Webb, 13 L. R. A., 321, and Gilbert v. Showerman, 23 Mich., 448.)

The case last cited is quite similar to the one in hand, except that it was therein sought to prevent the establishment and maintenance of a new business installed after the complainant and his family became residents of his adjoining property. The luminous

opinion in that case was written by Judge Cooley, and we quote its conclusion as follows:

"We can not shut our eyes to the obvious truth that if the running of this mill can be enjoined, almost any manufactory in any of our cities can be enjoined upon similar reasons. Some resident must be incommoded or annoyed by almost any of them. In the heaviest business quarters and among the most offensive trades of every city will be found persons who, from motives of convenience, economy or necessity, have taken up there their abode; but in the administration of equitable police, the greater and more general interests must be regarded rather than the inferior and special. The welfare of community can not be otherwise subserved and its necessities provided for. Minor inconveniences must be remedied by actions for the recovery of damages rather than by the severe process of injunction. On the whole case we are of opinion that the complainant, having taken up his residence in a portion of the city mainly appropriated to business purposes, can not complain of the establishment of any new business near him, provided such new business is not in itself objectionable as compared with those already established, and is carried on in a proper manner. We do not find from the evidence that the business of defendants was thus objectionable, or that in the manner of conducting it there is special ground of complaint. And the decree dismissing the bill must therefore be affirmed with costs. But the dismissal is to be without prejudice to any proceeding the complainant may be advised to take at law."

And in the very recent case of Galveston, H. & S. A. Ry. Co. v. DeGroff, 102 Texas, 432, 118 S. W., 138, our Supreme Court said: "The question of issuing an injunction, under such state of facts, depends upon the circumstances, and it is the duty of the court to consider the relative injury to the plaintiffs by a continuance of the nuisance to that which would be inflicted upon the defendant and the public by granting and enforcing an injunction, and if the injury to the plaintiffs appears to be greatly less in amount in comparison to that which will result to the railroad company and the public, then it is the duty of the court to deny the writ of injunction. Wees v. Coal & Iron Co., 54 W. Va., 430, 46 S. E., 166; Sheldon v. Rockwell, 9 Wis., 166, 76 Am. Dec., 265."

While the right of habitation is one of great importance, and while the law should and does afford all reasonable protection to the home, still, these high considerations do not, in all instances, override all others. Cotton is one of the most important products of this State, and cotton gins are absolutely essential to the welfare of that industry, and it can not be a sound rule of public policy nor a just rule of law which would outlaw them or require their owners, no matter how much care may and have been exercised and expense incurred in locating them, to move them elsewhere, merely because they result in some annoyance or discomfort to a family which has taken up its residence on adjacent property long after such gins have been located.

In the recent case of Sherman Gas & Electric Co. v. Belden, 123 S. W., 119, which was a suit for damages only, and not an effort to

restrain the operation of the plant, our Supreme Court held, in effect, that the matters complained of did not constitute a nuisance merely because they annoyed the plaintiff in that case, and that the true test was whether or not they were such as would materially annoy and disturb persons of ordinary sensibilities, tastes and habits. But in this case, where the severe remedy of injunction is sought, such relief should not be granted unless, in addition to the proof ordinarily necessary to establish the existence of a nuisance, it is made to appear that, in maintaining his gin at its present location, the defendant is acting unreasonably; and the question of the reasonableness of his conduct is a question of fact to be determined from all the testimony, including that heard on the former trial, and any other which may tend to show the expense or loss of abandoning the gin or removing it to some other locality free from similar objections by adjacent owners, and whether or not such other locality can be had at all.

We also deem it proper to say, by way of suggestion, that if the case is tried with a jury, it would seem to be eminently proper to submit it upon special issues, and, after the facts are found, the court can then determine what would be the proper judgment to render.

The judgment is reversed and the cause remanded.

Reversed and remanded.

J. R. FOLKES ET AL. v. W. R. WYATT.

Decided March 9, 1910.

1.—Fraudulent Conveyance.

The fact that a grantor who by deed exchanged his real property in Texas for other real estate in California had no other property in Texas at the time, does not, it seems, establish his insolvency or that his conveyance was made to defraud creditors.

2.—Same—Knowledge by Purchaser.

The intent of a grantor to defraud creditors by his conveyance does not affect the title of his grantee who paid a valuable consideration without knowledge of such intent.

3.—Attachment—Innocent Purchaser.

Where a creditor attached and bought in land which his debtor had conveyed by deed prior to but recorded after the attachment levy, he acquired no title if he had knowledge of such conveyance before acquiring his attachment lien. Any one purchasing from him after the debtor's prior conveyance was recorded had the burden of proving that his grantor's attachment lien was acquired without notice of the conveyance in order to sustain his title against it.

4.—Evidence—Notice.

On the question whether an attaching creditor had notice or was put on inquiry as to the existence of a deed from the debtor unrecorded when the writ was levied it was proper to show that about a month before the deed was made such creditor was informed of the details of a pending trade to be closed by such conveyance from the debtor on his title being approved.

Appeal from the District Court of McLennan County. Tried below before Hon. Marshall Surratt.

Eugene Williams, W. B. Carrington and *Eason & Dilworth,* for appellants.—Black v. Vaughan, 70 Texas, 49, holds payment of any cash avoids sale of insolvent debtor. Ward v. Wofford, 26 S. W., 321, holds a purchaser chargeable with knowledge of debtor's insolvency is required to see that the money is applied to insolvent's debts. Proetzel v. Buck, S. & R. Co., 26 S. W., 1110, holds knowledge that by the sale the debtor would divest himself of all property save what was apparently exempt from execution, and payment to debtor of purchase money without seeing it was applied by him to the payment of his debts, made the sale, in the eye of the law, fraudulent and void as to creditors, although the purchaser might believe the debtor would apply the purchase money to liquidation of his debts. Paddock v. Jackson, 16 Texas Civ. App., 655, holds: "By the conveyance to Jackson, Ayres stripped himself of all his property within the reach of his creditors. . . . The necessary effect of this was to defraud his creditors. . . . The absence of a bad motive does not relieve the transaction of its fraudulent character. The parties are held to have contemplated the consequences of their act, and this constitutes the fraudulent intent which vitiates the conveyance. . . . The judgment will be reversed and here rendered in favor of appellants." Halff v. Goldfrank, 49 S. W., 1097; Stuart v. Smith, 21 S. W., 1027; Willis v. Yates, 12 S. W., 233; Lambeth v. McClinton, 65 Texas, 110; Ellis v. Valentine, 65 Texas, 543; Oppenheimer v. Halff, 68 Texas, 412; Seligson v. Brown, 61 Texas, 180; Elser v. Graber, 69 Texas, 225; Armstrong v. Elliott, 20 Texas Civ. App., 41; Williams v. Moore, 6 Texas Civ. App., 340. Parish v. Murphree, 13 Howard, 97, holds: "If a settlement be made without any fraudulent intent, yet if the amount thus conveyed impaired the means of the grantor so as to hinder or delay his creditor, it is to them void." Seger v. Thomas, 18 S. W., 33; First Nat'l Bank v. Fry, 115 S. W., 443; Bump on Fr. Con., 476.

The legal title of an attaching creditor is superior to the title of a person claiming under a prior unrecorded deed from the debtor. Hence a person who purchases this superior legal title for value, and without notice of facts which are sufficient to subordinate the legal title to the prior unrecorded deed, acquires a title superior to the title held under the prior unrecorded deed, even though the unrecorded deed be placed of record prior to the purchase; and the fact that the beneficial title may be in the person claiming under the unrecorded deed is immaterial. Sayles' Statutes, article 4640; Grace v. Wade, 45 Texas, 526; Turner v. Cochran, 94 Texas, 484; Barnett v. Squyres, 93 Texas, 193; Patty v. Middleton, 82 Texas, 591; Taylor v. Harrison, 47 Texas, 457; Laughlin v. Tips, 8 Texas Civ. App., 653; White v. McGregor, 92 Texas, 556; Fullenwider v. Ferguson, 30 Texas Civ. App., 156.

A bare recollection, called to the memory of a creditor at the time of his levy of an attachment on real estate, of long past negotiations between his debtor and a third party with reference to a sale of such real estate by his debtor to such third party, which negotiations were long afterwards, without notice of any character to the attaching creditor, consummated into a deed, duly executed and delivered but

not placed of record, is sufficient, as a matter of law, to constitute notice, either actual or constructive, to such attaching creditor of such outstanding unrecorded deed at the time of his attachment. Stanley v. Schwalby, 162 U. S., 255; Poling v. Williams, 46 S. E., 704; White v. McGregor, 92 Texas, 560; Moran v. Wheeler, 87 Texas, 184; Bell v. Riddle, 31 Texas Civ. App., 411; Eylar v. Eylar, 60 Texas, 319.

E. S. Street, for appellee.—That strangers to a contract can not take advantage of statute of frauds, see Gulf, C. & S. C. Ry. Co. v. Settegast, 79 Texas, 256; League v. Davis, 53 Texas, 14; Lee v. Wilmerding, 57 Texas, 444; Bringhurst v. Texas Company, 39 Texas Civ. App., 500.

The charge as requested was upon the weight of the evidence, and gave undue prominence to the facts therein recited, and was erroneous, and the court did not err in refusing to give same. Quinn v. Glenn Lumber Co., 118 S. W., 733; McKay v. Peterson, 52 Texas Civ. App., 195; Dupree & McCutchan v. Texas & P. Ry. Co., 96 S. W., 647; Medlin v. Wilkins, 60 Texas, 409; Houston & T. C. Ry. Co. v. Hodde, 42 Texas, 470.

One who purchases from an attaching creditor whose attachment is antedated by a deed recorded at the time of the purchase but unrecorded at the time of the levy of the attachment, must show that the creditor through whom he claims had no notice of the prior deed at the time of the levy of the attachment. L. & H. Blum Land Co. v. Harbin, 33 S. W., 153; Walker v. Downs, 64 S. W., 682; Illies v. Frerichs, 11 Texas Civ. App., 575; Watkins v. Edwards, 23 Texas, 443; Kimball v. Houston Oil Co., 100 Texas, 341; Ryle v. Davidson, 102 Texas, 227.

RICE, ASSOCIATE JUSTICE.—In August, 1907, W. F. McCormick owned certain real estate situated in Waco, consisting of a house and lot on Webster Street and three vacant lots, Nos. 8, 9 and 10 on Twelfth Street, the latter out of the Bagby addition; and the appellee Wyatt owned certain real estate in Los Angeles, California, and at that time they were both in California, and through one Whittenberg, a real estate agent, they began negotiations for an exchange of said properties, which was finally consummated on September 20, 1907, by an exchange of deeds. And in August, while all the parties were in California, Wyatt made and executed his deed conveying to McCormick the Los Angeles property, which, together with his abstract of title, was deposited in the First National Bank of Pasadena, to be delivered to McCormick in the event that his title to the Waco property should, upon examination, prove good, and at the same time both parties deposited in said bank $100 as a forfeit in the event they should fail to carry out their contract. It was understood between them that Whittenberg, who was returning to Waco, should have the title to the Waco property examined, and if found good, to draft a deed or deeds therefor, which should be returned to the bank at Pasadena for execution by McCormick; and the bank, upon his doing so, should deliver him the Wyatt deed to the California property and re-

turn to Wyatt the McCormick deed to the Waco property. In pursuance of this arrangement W. L. Eason, Esq., one of the appellants herein, who was an attorney at Waco, was employed and paid by Wyatt to pass upon the title to the Waco property, and upon examination reported the title good, whereupon the deeds were forwarded to the bank at Pasadena for execution by McCormick. It seems that prior to this time Eason, as attorney, had been employed by McCormick to bring suit for the Webster Street property, and also to procure a divorce for one Riddle, who had married the former wife of McCormick, and claimed for this service a balance due of $25; but it appears, we think, from the evidence that the $25 was in payment for services for the divorce suit, which at that time had not been filed, and was not, in fact, filed until December thereafter. Whittenberg, at the time that Eason was employed to examine the title to the Waco property, informed him of the trade then pending between appellee and McCormick, and the terms thereof, and we find that he understood that the exchange of properties would be made upon the title proving satisfactory. Eason informed Whittenberg of his claim for $25 against McCormick. McCormick owed Whittenberg commissions on the transaction, and there was evidence to the effect that McCormick was to pay certain taxes and other expenses.

It was finally agreed between Whittenberg and Eason, without McCormick's consent or knowledge, that, when the deeds were forwarded to the bank, they should also draw a draft against McCormick to cover Whittenberg's commissions and the expenses named, as well as the Eason fee, which it appears was done by Whittenberg. McCormick, who was not a party to this arrangement, declined however to pay the draft so drawn, on the ground that Eason's fee was not due, as the divorce suit had not been filed; and further objected to certain items of the expense bill of Whittenberg, of which facts Eason was apprised, both by Whittenberg and through a letter to him from McCormick. Finally Whittenberg notified Eason that he did not intend to allow the trade to fall through on account of his claim, and directed the bank to deliver the deed upon McCormick's paying his charge for commissions, taxes, etc., deducting certain items of expenses, as well as the Eason claim, which being done, the deed was, on the 20th of September, 1907, duly executed and delivered to the bank by McCormick for Wyatt, and Whittenberg and Wyatt notified thereof. *There is testimony to the effect that Eason was also notified of the execution by McCormick of said deed.* Thereafter, on October 7, 1907, Eason sued McCormick in the Justice's Court at Waco for $25, and on the same day had issued and levied an attachment on said three vacant lots in controversy as the property of McCormick. On January 13, 1908, Eason recovered judgment in said court against McCormick; and on February 7, 1908, an execution was duly issued thereon, and on March 3d thereafter said lots were sold by the constable and bought in by Eason, and on March 7, 1908, Eason conveyed to Folkes one and one-half of said lots.

There is evidence showing that soon after the execution of the deed by McCormick to Wyatt that he moved into the house on Webster Street, and likewise took possession of the vacant lots by repair-

ing the fence and putting up a sign that the same were for sale; and while it is admitted by Eason that he had knowledge of Wyatt's possession and occupancy of the Webster Street property at the time the attachment was sued out, yet he denied knowledge of Wyatt's possession of the vacant lots.

Wyatt's deed was executed on September 20, 1907, but was not recorded until November 19, 1907. This suit was brought by Wyatt against Folkes and Eason in an action of trespass to try title for the recovery of said three vacant lots, and likewise to remove cloud cast upon the title thereto by said constable deed.

Eason disclaimed as to the lot and a half sold by him to Folkes, and by plea of not guilty as to the remaining lot and a half, and Folkes disclaimed as to the lot and a half still claimed by Eason, and answered by a plea of not guilty as to the remaining lot and a half; and both likewise prayed that the cloud cast on the title to their respective lots by the McCormick deed be removed.

There was a jury trial and verdict and judgment in favor of Wyatt, from which appellants prosecute this appeal.

By their first five assignments of error appellants present, in different phases, the contention that the deed from McCormick to Wyatt was fraudulent and void as to Eason, who was a creditor of McCormick, and for which reason they were entitled to recover; and this contention is predicated upon our statute, article 2544, which provides that: "Every gift, conveyance, assignment or transfer of, or charge upon any estate, real or personal, every suit commenced, or decree, judgment or execution suffered or obtained, and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are or may be lawfully entitled to shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void. This article shall not affect the title of a purchaser, for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

So that for appellants to recover it must appear, not only that the conveyance was made by McCormick with intent to delay, hinder or defraud Eason, but, since it is conclusively shown that a valuable consideration was paid for said lots by Wyatt, it must further appear that he had notice of such fraudulent intent on the part of McCormick. We think the evidence fails to establish that the conveyance was made by McCormick with intent to hinder, delay or defraud his creditors; and, certainly, there is no evidence in the record showing or tending to show that appellee had any notice of any such fraudulent intent, even if any such existed, and without which appellants' contention, it seems to us, must fail. It is true that appellee knew of Eason's claim against McCormick; and while there is an agreement in the record to the effect that McCormick had no other property in Texas than the lots sold Wyatt, still this does not establish his insolvency. Besides, it appears that he was obtaining valuable property in California by the exchange; and the evidence further fails to show that Wyatt knew that this was the only property possessed by him in the State. But, even if it were conceded that McCormick was

insolvent (which we think the record fails to show) yet it has been held, as shown by the syllabus in Cox v. Morrison, 31 S. W., 85, that insolvency of a vendor at the time of a sale will not defeat title of a vendee purchasing for a valuable consideration, without notice of the vendor's insolvency.

Believing that these assignments are not sustained by the record, the same are overruled.

With reference to the claim of appellant Folkes, it is urged that the court erred in failing and refusing to give in charge to the jury special charge No. 1, which reads as follows: "The uncontradicted evidence shows that at the time the defendant Eason conveyed to the defendant Folkes the lot and one-half described in the answer of the defendant Folkes, that the defendant Eason had the superior record title to said lot and one-half, and that the defendant Folkes had no knowledge of any facts that would render the legal title acquired by him inferior to the title of the plaintiff. You will therefore find in favor of the defendant Folkes for the lot and one-half described in his answer." And by his proposition thereunder insists that the legal title of an attaching creditor is superior to the title of a person claiming under a prior unrecorded deed from the debtor. Hence a person who purchases this superior legal title for value, and without notice of facts which are sufficient to subordinate the legal title to the prior unrecorded deed, acquires a title superior to the title held under the prior unrecorded deed, even though the unrecorded deed be placed of record prior to the purchase; and the fact that the beneficial title may be in the person claiming under the unrecorded deed is immaterial.

Appellee, however, by his counter-proposition, contends that one who purchases from an attaching creditor whose attachment is antedated by deed recorded at the time of the purchase, but unrecorded at the time of the levy of the attachment, must show that the creditor through whom he claims had no notice of the prior deed at the time of the levy of the attachment. It will be remembered that the deed from McCormick to Wyatt is dated September 20, 1907, and is recorded November 19, 1907, and that Eason's attachment on the lots in controversy was levied October 7, 1907. It was agreed in writing that the defendant Folkes was a purchaser in good faith and for value, and without any notice of Wyatt's claim, save and except such as was imputed to him by reason of the record of the Wyatt deed. The deed to Folkes is dated March 7, 1908.

We are inclined to think that the record of the Wyatt deed was sufficient notice to Folkes, who bought thereafter, and that the contention of appellee should be sustained. In Walker v. Downs, 64 S. W., 682, it is said, as shown by the syllabus, "where in trespass to try title it is shown that a defendant's unrecorded deed was executed prior to the title asserted by plaintiff, which was obtained through execution sale, plaintiff can not overturn the defendant's title in the absence of a showing that his lien was acquired without notice of defendant's claim to the property."

In Watkins v. Edwards, 23 Texas, 443, it is held that, to postpone a prior unregistered conveyance in favor of a subsequent vendee, it

must appear that he had bona fide paid the purchase money, and had neither actual nor constructive notice of the title of the prior vendee. See also Blum Land Co. v. Harbin, 33 S. W., 153; Illies v. Frerichs, 11 Texas Civ. App., 575, 32 S. W., 915; Kimball v. Houston Oil Co., 100 Texas, 341; Ryle v. Davidson, 102 Texas, 227, 115 S. W. 28. It is evident that the jury found that Eason, the attaching creditor, under the charge of the court had notice of appellee's unrecorded deed at the time he levied his attachment; and, since Folkes purchased after the deed was recorded, it must be held that he had constructive notice thereof. Therefore the court, in our judgment, did not err in refusing to give the charge requested, and this assignment is overruled.

During the progress of the trial, over objection of appellants, Whittenberg was permitted to testify that, upon his return from California in August, 1907, he told Eason of the exchange of properties between Wyatt and McCormick, and likewise told him of the execution by Wyatt of the deed and the depositing of the same, together with the abstract and the forfeits by both parties in the Pasadena bank, and that if the title was good to the Waco property, that he was to draft deeds and send them to McCormick for execution. This evidence, in our judgment, bore directly upon the issue as to whether or not appellant Eason, on October 7, 1907, the date of the levy of his attachment, knew that the property in controversy had been conveyed prior thereto to appellee, or whether he had notice of such facts as would put a prudent person upon inquiry, and for which reason the same, in our opinion, was admissible. The assignment presenting this question is, therefore, overruled.

We think the evidence is sufficient to support the verdict, and therefore overrule the remaining assignment challenging its sufficiency in this respect.

Finding no error in the judgment of the trial court, the same is in all things affirmed.

Affirmed.

Writ of error refused.

H. B. EASTERWOOD v. PYKE BURNETT.

Decided March 9, 1910.

1.—Briefs—Ruling on General Demurrer.

An assignment, in general terms, of error in overruling a general demurrer, though sufficient as an assignment, must be followed in appellant's brief by appropriate propositions presenting specific questions of law, in order to entitle it to consideration.

2.—Same—Rulings on Evidence.

A brief asserting error in the rulings on admissibility of evidence must show the objections made to its introduction.

3.—Dormant Judgment—Evidence.

In an action on a dormant judgment in Justice Court, rendered against E. & Co., the record showing that defendant appeared in person and by attorney, but failing to show, the citation being lost, who composed the firm, was

cited, or appeared, it was permissible to show, by parol that the citation was against E. alone, doing business under the style of E. & Co., and that he was the person served, appearing, and against whom the judgment was rendered, and on such proof to render judgment against him upon the former recovery.

Appeal from the County Court of Robertson County. Tried below before Hon. Will C. Perry.

J. Felton Lane, for appellant.—It was error to overrule defendant's general demurrer: McFadden v. Lockhart, 7 Texas, 573; Ulmer v. Frankland, 27 S. W., 766; Frank v. Tatum, 87 Texas, 204; Houghton v. Puryear, 10 Texas Civ. App., 383; Kingsland v. Mitchell, 36 S. W., 758; Standard L. & P. Co. v. Muncey, 33 Texas Civ. App., 416; Perry-Rice Gro. Co. v. Craddock Gro. Co., 34 Texas Civ. App., 442.

The judgment which plaintiff seeks to revive is void and not capable of being revived by scire facias, in that same was a judgment in a suit not brought against the individuals composing the firm sued, but against the firm as such, and there were, therefore, no legal parties defendant before the said court, and neither one nor all of the members of said firm were made parties as individuals. Frank v. Tatum, 87 Texas, 204; Glasscock v. Price, 92 Texas, 274; Owen v. Kuhn, Loeb & Co., 72 S. W., 432; Chicago, T. & M. Ry. Co. v. Titterington, 84 Texas, 218; McLane v. San Antonio Nat'l Bank, 68 S. W., 65; Foust v. Warren, 72 S. W., 406; McFadden v. Lockhart, 7 Texas, 573; Ulmer v. Frankland, 27 S. W., 766.

Plaintiff's pleadings show on their face that plaintiff has not made all the parties to the original judgment parties to this action to revive. Scalfi v. Graves, 31 Texas Civ. App., 667.

The evident purpose of the testimony was to reform, amend and correct a judgment, and said testimony was not admissible for that purpose after four years from the rendition of said original judgment; whereas, in this case the four years statute of limitations had been interposed. Rev. Stats., art. 3358; Farmers' L. & T. Co. v. Beckley, 93 Texas, 267; McLane v. San Antonio Nat'l Bank, 68 S. W., 65; Foust v. Warren, 72 S. W., 406; Watson v. Texas & P. Ry. Co., 73 S. W., 830.

Said judgment was void upon its face, and therefore could not form the basis of any suit to revive the same nor of an action of debt thereon. McFadden v. Lockhart, 7 Texas, 573; Ulmer v. Frankland, 27 S. W., 766; Frank v. Tatum, 87 Texas, 204.

Bailey, Woods & Morehead, for appellee.—The purpose of the testimony complained of was not to reform, amend or correct the judgment, but was merely explanatory thereof, and was, therefore, not barred by the four years statute of limitation. Hodges v. Robbins, 23 Texas Civ. App., 57; Jones v. Robb, 35 Texas Civ. App., 263; Newman v. Mackey, 37 Texas Civ. App., 85; Dunlap v. Southerlin, 63 Texas, 38; State v. Cloudt, 84 S. W., 415.

The testimony being amply sufficient to sustain the findings of the court and, in fact, being conclusive that citation was issued in said

original cause, the court did not err, and could not have found other than he did. Dunlap v. Southerlin, 63 Texas, 38; Hodges v. Robbins, 23 Texas Civ. App., 57; Croom v. Winston, 18 Texas Civ. App., 1; Smith v. Chenault, 48 Texas, 455; Stephens v. Turner, 9 Texas Civ. App., 623; Blumenthal v. Youngblood, 24 Texas Civ. App., 266.

KEY, CHIEF JUSTICE.—This is an action of debt, founded upon a dormant judgment, and from a recovery in favor of the plaintiff the defendant has appealed. The trial court filed the following findings of fact and conclusions of law:

"*Findings of fact.*—I. I find that Pyke Burnett, the plaintiff in this suit, on the 6th day of January, 1900, filed suit against H. B. Easterwood & Co. in the Justice's Court of precinct No. 2 of Robertson County, Texas, and that citation was issued in said suit on the same day; that on the 15th day of February, 1900, plaintiff recovered a judgment in said suit against H. B. Easterwood & Co. for the sum of $149.76, with interest from the date of said judgment at the rate of six percent per annum and for costs of suit; I further find that the costs of said suit amounted to the sum of $5.10, and that said costs were paid by plaintiff. In connection with this finding of fact I attach hereto a transcript of the Justice's Court docket, marked Exhibit 'A,' showing the judgment of said Justice's Court in said cause, and showing also other notations on said docket in said cause, which transcript I find to be an accurate copy of all the entries made upon said docket in said cause.

II. "I find that no execution was issued on said judgment of said Justice's Court; that the same was not appealed from or otherwise vacated; that the same has not been paid, in whole or in part, and that the plaintiff herein, Pyke Burnett, is the present owner of said judgment.

III. "I find that it does not appear from the recitals of said judgment who composed the firm of H. B. Easterwood & Co., nor does it appear therefrom upon whom, if any person, service was had, nor who appeared and answered in said suit; but I find that said judgment does recite that the 'Deft.' appeared in person and by attorney and announced ready for trial.

IV. "I find that said judgment, read alone in the light of the recitals therein contained, is ambiguous as to the party or parties against whom it was rendered.

V. "I find that all of the original papers in the case wherein said judgment was rendered, including the citation and the return thereon, have been lost or destroyed.

VI. "I find from evidence aliunde the record that said suit in said Justice's Court was brought against H. B. Easterwood & Company, which in the citation issued in the original suit was alleged to be a mercantile firm composed of H. B. Easterwood as the sole constituent member; and I further find that said citation in the trial of the cause in the Justice's Court was adopted by plaintiff as his pleadings in the case.

VII. "I find that H. B. Easterwood & Co. was at the time that

said suit was brought and said judgment rendered in said Justice's Court, a mercantile firm, whose sole constituent member was H. B. Easterwood, the defendant in this suit; and I further find that the said H. B. Easterwood, in person and by attorney, appeared and defended said suit against H. B. Easterwood & Co.

VIII. "I find that defendant is indebted to plaintiff on said judgment in the sum of $239.24, and was so indebted to plaintiff on the 16th day of March, 1909, when the judgment in this suit was rendered.

"*Conclusions of law.*—I. I conclude that the judgment here sued upon, being ambiguous, must be read in the light of the entire record of the case originally tried in the Justice's Court of precinct No. 2, which, in the sense here used, I conclude to embrace the pleadings and citation in said original suit.

II. "It having been affirmatively shown that the citation and all of the papers in said original suit were lost, and it further appearing in the trial of said suit that plaintiff had adopted his citation as his pleadings in said suit, I conclude that parol testimony was admissible for the purpose of showing what said citation contained; and I further conclude that it was admissible in the trial of this suit for plaintiff to show parol testimony that the recital in the judgment of said Justice's Court of the fact that 'Deft. also appeared in person and by attorney and announced ready for trial' had reference to H. B. Easterwood, the defendant in this suit.

III. "I conclude that the judgment against H. B. Easterwood & Co. is a valid and binding judgment against H. B. Easterwood, who was the sole member of said firm, and who, in the trial in which said judgment was rendered, appeared and answered in person in said cause.

IV. "I conclude that plaintiff is entitled to judgment in this suit against said H. B. Easterwood for the sum of $239.24, the amount due plaintiff by defendant upon said judgment rendered in said Justice's Court.

"Will C. Perry,
"County Judge of Robertson County, Texas, presiding in the trial of this cause.

"*Exhibit 'A.'*—On this, the 15th day of Feby., A. D. 1900, the above styled and numbered cause came on to be heard and tried, and the plaintiff appeared in person and by attorney and announced ready for trial, and the deft. also appeared in person and by atty. and announced ready, and the court after hearing the evidence, pleadings, law and argument as submitted by each, is of the opinion that the law and the evidence is with plaintiff Pyke Burnett, and that he should have and recover of and from the defts. H. B. Easterwood & Co. the sum of $149.76, amount sued for on note, and all costs of this suit and interest thereon at 6 percent per annum from this date until paid, all of which is so ordered, adjudged and decreed and for which let execution issue.

"W. C. Bishop, J. P.

"Deft. denies each and every allegation in plaintiff's citation and requires strict proof of same. Says that if the said note was ever made and executed that he had fully paid off, extinguished, satisfied and discharged said obligation. Claims that the interest is usurious and illegal.

"W. C. Bishop, J. P."

Opinion.—The first assignment of error asserts, in general terms, and without stating any reason therefor, that the court erred in overruling the defendant's general demurrer to the plaintiff's pleadings. In the appellant's brief it is sought to submit that assignment as a proposition of law, and it is not followed by any proposition or statement indicating any reason why it is claimed that the court erred in the ruling complained of. This does not present any question for the decision of this court. We do not mean to hold that the assignment of error is too general if it had been followed by an appropriate proposition and a statement presenting some particular question for decision, but the assignment itself does not assert any specific proposition of law, and therefore it can not be submitted as such. Appellant's brief contains several other assignments in the same condition.

There are also several assignments relating to rulings upon the admissibility of testimony, but appellant's brief does not indicate the objections made to the introduction of the testimony, and therefore the questions of law involved in the rulings referred to are not presented in appellant's brief, and can not be ascertained without looking to the transcript. This is not in compliance with the rules, but the bills of exception have been examined, and we think the trial court ruled correctly.

All other questions have been considered, and, without prolonging this opinion, and without further discussion, we adopt and approve the trial court's conclusions of law, and in support thereof, and of the judgment sought to be reversed, the following authorities are cited: Dunlap v. Southerlin, 63 Texas, 38; Hodges v. Robbins, 56 S. W., 565; Crum v. Winston, 18 Texas Civ. App., 1, 43 S. W., 172; Stephens v. Turner, 9 Texas Civ. App., 623, 29 S. W., 937; Blumenthal v. Youngblood, 24 Texas Civ. App., 266, 59 S. W., 290; Smith v. Chenault, 48 Texas, 555; State v. Cloudt, 84 S. W., 415.

Affirmed.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY v. THOMAS SEEGER.

Decided March 9, 1910.

1.—Master and Servant—Fellow Servant—Common Law—Concurring Negligence—Case Overruled.

Even though a master may not be liable for injury inflicted upon a servant by the negligent act of a fellow servant, still when the negligence of the master is an active concurring cause with the negligence of the servant in producing the injury, the master will be liable. In so far as the opinion on a former appeal of this case, 44 Texas Civ. App., 534, trenches upon the foregoing proposition, the same is overruled.

2.—Same—Case Stated.

Where a railroad fireman, while under his locomotive engaged in the performance of his duty to clean out the ash-pan, was injured by the moving of the locomotive, and the moving was caused by the concurring negligence of the railroad company in furnishing a locomotive with a leaky throttle, and of the engineer in reversing the lever and releasing the brakes, the fireman was entitled to recover against the company even though the injury occurred in a jurisdiction where the master was not liable for injuries caused by the negligence of a fellow servant.

3.—Charge—Construction.

A charge should be considered and construed as a whole. Any charge can be distorted if only garbled portions of it are taken up for criticism.

4.—Trial—Contradictory Testimony.

The trial court had no authority to reject testimony because of contradiction in it. It is the province of the jury to reconcile such contradictions

5.—Personal Injuries—Damages not Excessive.

Evidence as to injuries to an arm considered and held sufficient to support a verdict for $7,922.

Appeal from the District Court of El Paso County. Tried below before Hon. A. M. Walthall.

Terry, Cavin & Mills and *A. H. Culwell,* for appellants.—The evidence in this case wholly fails to show any such negligence on the part of the railway company as would make it responsible for the loss complained of. The evidence, without contradiction, shows that an active, overt act was committed by Engineer Hoehn, and but for which the engine would not have moved. The evidence shows that it was his purpose to move, and the evidence further shows, as is demonstrated by the physical facts, that the engine would have remained in a stationary position but for his act. Atchison, T. & S. F. Ry. Co. v. Seeger, 44 Texas Civ. App., 534.

(Second assignment of error).—"The court erred in refusing to give the defendant's special charge No. 1, which is as follows: 'The only negligence claimed by plaintiff as being the cause of his injury was this: that the throttle valve of the throttle to the engine 681 was, at the date of plaintiff's injury, in a leaky condition, and that such leaky condition caused the engine to move involuntarily, which movement caused plaintiff's injury. Now, in order to recover because of the leaky throttle or throttle valve, you must find from all the evidence that the said leaky throttle or throttle valve, and nothing else, caused the engine to move; and you must further find that at said time and place said engine was not in a reasonably safe condition;' for the reason that said charge No. 1 was called for and demanded by the evidence in this case, and because the matters suggested therein were not covered by any charge given by the court, but was the law in this case, and the failure to give same was prejudicial error."

(Sixteenth assignment of error.)—"The court further erred in charging upon concurring causes, for that under the evidence in this case there was no such issue as that of concurring causes, for the reason that all the testimony upon the condition of the engine at the

time of the accident established beyond question that Engineer Hoehn, notwithstanding the then condition of the engine or any existing defect in the throttle or throttle valve, could absolutely control its movements and keep it at a standstill. Engineer Hoehn reiterates this statement, and there is no other testimony upon the issue. This being so, it was error in the court to charge repeatedly upon concurring causes as it did. The engine, being a piece of machinery absolutely subject to the control of the engineer, was one of reasonable safety, as a matter of law, and all the charges and paragraphs thereof referring to concurring causes were erroneous, were misleading, and greatly prejudicial to the rights of the defendant before the jury."

(Seventeenth assignment of error.)—"The court further erred in the twelfth paragraph of his main charge in stating to the jury as follows: 'Unless you believe from a preponderance of the evidence that said throttle valve of said engine No. 681 was leaky, as alleged by plaintiff, and that defendant was guilty of negligence in furnishing and using said engine with said leaky throttle valve for doing the work in hand, and that said leaky throttle valve, if any, approximately caused the said engine to move backward, and plaintiff's arm to be crushed and injured, then your verdict must be for the defendant.' For the reason that the court limits the right of the defendant to a verdict to the existence of the numerous conditions mentioned by it in said paragraph, when the evidence showed that it was not the leaky throttle or throttle valve which caused any injury to plaintiff, but the manner in which said engineer handled said engine, for the engineer emphatically states that he at all times had control of his engine; that he kept it standing as long as he intended to; that he could have held it by the brakes and by keeping the lever on center, which establishes said engine to be a reasonably safe piece of machinery."

(Eighteenth assignment of error.)—"The court further erred in paragraph twelve of his main charge in telling the jury as follows: 'If, however, you believe from a preponderance of the evidence that said throttle valve was leaky, as alleged by plaintiff, and that the defendant company, before the injury to plaintiff, by the exercise of reasonable care, would have known thereof, and that the furnishing of said engine for the work in hand, with said throttle valve so leaky, was negligence on the part of the company, and that such negligence was the proximate cause of said engine moving backward and causing the plaintiff's arm to be crushed, and that said Engineer Hoehn did not intend that said engine should start upon the throwing of said lever and the releasing of the air before the opening of the throttle, and further believe that the plaintiff himself was not guilty of negligence contributing to bring about his injury, and that he did not assume the risk, then your verdict should be for the plaintiff.'"

(Twentieth assignment of error.)—"The court erred in paragraph eight of its charge, in which it tells the jury as follows: 'Now, therefore, if you believe from the preponderance of the evidence that the throttle valve of the defendant's said engine No. 681 was leaky at the time of plaintiff's injury, as alleged by plaintiff in his petition, and that by reason of such leaky condition, if any, while plaintiff was engaged in the discharge of his duty under said engine No. 690, the

steam leaked and escaped into the steam chest of said engine No. 681, and that Hoehn, the engineer in charge of said engine No. 681, threw his reverse lever into backward motion, and that upon his doing so the steam, which had accumulated in the steam chest, if it had so escaped into the cylinder of said engine No. 681, and upon the releasing of the brakes of said engine, by reason of the steam having so escaped into the cylinder, if it so had, caused the engine No. 681 to move backward without the engineer, Hoehn, having opened the throttle, and without said Engineer Hoehn having intended that it should so move before the opening of said throttle, and that such movement of said engine No. 681 pushed or moved said engine No. 690, which plaintiff was under, and thereby caused plaintiff's arm to be caught, crushed and injured, as alleged, as approximate consequences of such leaky throttle, if any, and that the defendant, before such injury was inflicted upon the plaintiff, by the exercise of ordinary care should have known of such leaky condition, if any, of such throttle valve, and that it was negligence on the part of the defendant company to have so furnished and operated said engine with its throttle valve in such leaky condition, if leaky, that such negligence, if any, on the part of the defendant company was the proximate cause of said engine so moving off and injuring plaintiff, then and in that event you should find for the plaintiff.'"

Patterson, Buckler & Woodson, for appellee.

FLY, ASSOCIATE JUSTICE.—Appellee sued appellant to recover damages arising from personal injuries received by him while in the employment of appellant as a fireman, the injuries having been received in the Territory of Arizona. It was alleged that appellee was a fireman on a train drawn by two engines, he being employed on the rear engine, and that he, in discharge of his duties, was under his engine cleaning out the ashpan, when there was a sudden movement of the engine and his arm was badly hurt. He alleged that the movement of the engine was caused by the leaky condition of the throttle and throttle valve on the front engine, which caused the steam to escape into the cylinder and result in an automatic movement. Appellant answered that the injuries were received through the negligence of the engineer on the front engine, who was, in Arizona, a fellow servant of appellee, and that he could not, therefore, recover. The cause was tried by jury, and resulted in a verdict and judgment for appellee for $7,922. This is a second appeal. (44 Texas Civ. App., 534, 98 S. W., 892.)

It appears from the evidence that engine number 681 was attached to an engine in the rear of it which was attached to a train, and the rear engine was known as number 690, upon which appellee was working as a fireman. In January, 1903, while the two engines were at a standstill at the town of Williams, in Arizona, appellee went under the rear engine, number 690, to clean out the ashpan, and while under there he heard three short blasts of the whistle of front engine number 681, which meant it wanted to "back up," and the engines moved, and appellee was seriously and permanently injured in one of his

arms. The evidence justifies the conclusion that the accident would not have occurred had it not been for the defective condition of engine number 681, which defective condition was known to appellant. The throttle or throttle valve on the engine was leaky and would permit steam to escape into the cylinder and cause the engine to move when the lever was down and the brakes off. With an engine in good condition, standing still, the putting down of the reverse lever and taking off the brakes, without opening the throttle, would not cause the engine to move. The throttle was not open, and when the engineer put down the reverse lever, gave three signals and released the brakes, he did not expect the engine to move until the throttle was opened. The engine did move, however, because steam had escaped from the defective throttle of the engine into the cylinder. The engineer on engine 681 swore that he did not know that appellee was under the rear engine. We conclude that the defective condition of the throttle was the proximate cause of the injuries to appellee. There was no testimony tending to show that the engineer knew that the cylinder had accumulated by the leakage sufficient steam to move the train.

The evidence clearly showed that the injuries inflicted on appellee resulted from the negligence of appellant in furnishing a defective engine, and if it be conceded that the engineer was negligent in reversing the lever and releasing the brakes, the defect was an active concurring cause with the act of the engineer in producing the result, and appellant was liable. Texas & P. Ry. v. Scott, 64 Texas, 549; Houston & T. C. Ry. v. O'Hare, 64 Texas, 602; St. Louis & S. F. Ry. v. McClain, 80 Texas, 85; Ft. Worth & D. C. Ry. v. Mackney, 83 Texas, 410; Gulf, C. & S. F. Ry. v. Johnson, 83 Texas, 628. If there were expressions used on the former appeal that trenched in any manner upon the foregoing well established proposition of law, they must be disregarded.

The charge, whose rejection is complained of in the second assignment of error, ignores the principle of the negligence on the part of appellant in furnishing a defective engine concurring with the act of the engineer in producing the result, and was properly rejected. The court gave the law applicable to the facts of the case.

The third assignment of error is overruled. The charge of the court was full and explicit on the point sought to be presented in the rejected charge.

The fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth assignments of error complain of the rejection of special charges requested by appellant. They are not sustained for the reason that every issue in the case was clearly submitted to the jury in the charge of the court, and it was unnecessary to give the special charges, or any of them, even though some of them might have contained correct propositions of law. Several of the special charges were clearly erroneous under the facts.

The charge complained of in the fifteenth assignment is a portion of a charge that is not subject to criticism when read in connection with the part from which it has been disconnected. Any charge can be distorted if only garbled portions of it are taken up for criticism.

The sixteenth assignment of error fails to point out the portion of the charge that is assailed, and presents nothing for consideration. It may be said, however, that the evidence raised the issue of the acts of the engineer and appellant concurring to produce the result.

The charge complained of in the seventeenth assignment was not unfavorable to appellant, and it has no ground for complaint. There can be no possible doubt that if the leaky throttle was furnished by appellant, and it was negligence to furnish it, and such defective throttle was the proximate cause of the injury, appellant was liable for the injuries inflicted thereby, and the converse of that proposition is what appellant has complained of.

The charge assailed in the eighteenth assignment of error does not assume any state of facts, but every fact was presented to be found by the jury from the preponderance of the evidence. It can not be said, with due regard to the record, that there was no testimony that the engineer did not intend to start the engine when he moved the lever and released the brakes, when the record shows that the engineer swore: "I did not expect my engine to move until the throttle was open." It does not matter that he may have contradicted himself in connection with that statement; it was the province of the jury to reconcile the inconsistencies in the testimony. The court did not have the authority to reject the testimony on account of contradictions in it.

It appeared from the evidence that appellee's arm was crushed from about the wrist to his shoulder; that it was in bad condition at the time of the trial, and that there was a running sore on the elbow that would probably never heal, and that he had suffered great pain which had not ceased, and that he was unable to do anything for over a year. We do not think a verdict for $7,922 excessive.

The twentieth assignment of error is without merit. The court, in the charge assailed, does not assume the existence of any fact. The court did not assume that the throttle was leaky nor that steam would escape, but with the greatest care guarded against assuming that either existed. The charge was fully justified by the evidence.

The twenty-first and twenty-second assignments are reiterations of other assignments herein considered, and are overruled. The judgment is affirmed.

Affirmed.

Writ of error refused.

WM. F. PRATT v. C. E. SLADE ET AL.

Decided March 10, 1910.

1.—Trial—Special Issues—Judgment—Statute.

Although the special issues submitted by a trial court to the jury and the findings of the jury thereon be not in themselves sufficient to support the judgment rendered, it will be presumed, under the provisions of art. 1331. Sayles' Civ. Stats., that the additional facts required to support the judgment were found by the court, provided there is evidence in the record to sustain such findings.

2.—Same—Special Issues—Practice.

In the absence of a request for the submission of other special issues, an appellant can not complain that the issues submitted did not include all the issues in the case.

3.—Practice—Verdict Against Evidence.

To justify an appellate court in setting aside the verdict of a jury on the ground that it is against the preponderance of the evidence, it must be so against the overwhelming preponderance of the evidence as to be clearly wrong.

4.—Boundary Case—Appointment of Surveyor—Practice.

A motion to appoint a surveyor to locate the boundaries of a tract of land in controversy must be seasonably presented. A new trial will not be granted for that purpose.

5.—Judgment—Description of Land.

If a judgment describes the particular tract of land in controversy so that it can be located and identified, it is all that is required. That the description does not mention the original survey of which it is a part, nor disclose how much of said survey is included in the judgment, is immaterial.

Appeal from the District Court of Jasper County. Tried below before Hon. W. B. Powell.

W. W. Blake and *Roi Blake,* for appellant.—The court erred in submitting the case to the jury on the special issues on the motion of the defendant, the said charge being equivalent to withdrawing the case from the jury, when the facts were disputed on every issue of the case. Epstein v. Thomas, 16 Texas Civ. App., 619.

Where the issue is as to the boundary line of the survey the verdict and judgment should definitely fit the location of the disputed lines with reference to some known and undisputed object, and the verdict and judgment in this case having failed to fix the location of the Cole survey and the Hollis claim with reference to the true location of the Pratt survey, is void for uncertainty, and judgment could not be rendered against plaintiff for any certain amount of land. Choate v. San Antonio & A. P. Ry. Co., 90 Texas, 88; Reed v. Cavett, 1 Texas Civ. App., 154; McCurdy v. Bullock, 2 Texas Civ. App., 223; Fernandes v. Schiermann, 23 Texas Civ. App., 343; Best v. Splawn, 33 S. W., 1005; Dillingham v. Smith, 30 Texas Civ. App., 525; Welder v. Carroll, 29 Texas, 33; Reimers v. Quinnin, 49 Mich., 449; Jackson v. Wendell, 5 Wend. (N. Y.), 142; Hill v. Smith, 6 Texas Civ. App., 312.

A judgment against plaintiff for land should be sufficiently certain to apprise plaintiff of the amount of recovery, and the verdict and judgment leaving the location of the lands involved uncertain, and the issue being joined as to the location of both the north and west boundaries of the L. T. Pratt survey and not settled by the verdict and judgment, the same are void for uncertainty, and should have been set aside by the court. Newcomb v. Walton, 41 Texas, 318; Thompson v. Albright, 14 S. W., 1020; Devine v. Keller, 73 Texas, 364.

H. C. Howell, for appellee.

PLEASANTS, CHIEF JUSTICE.—This is an action of trespass to try title brought by the appellant against C. E. Slade, Ben Hollis and others, to recover the title and possession of the L. T. Pratt 640-acre survey in Jasper County. The suit was dismissed in the court below as to all the defendants except Ben Hollis. This defendant disclaimed as to all of the land sued for except so much thereof as might be included in a tract of 160 acres described in his answer, as to which he pleaded not guilty and title by limitation of ten years. The trial in the court below, with a jury, resulted in a verdict and judgment in favor of the defendant for the 160 acres of land claimed by him.

The plaintiff showed title to all of the 640-acre survey unless defendant has acquired title by limitation to that portion of said survey included within the boundaries of the 160 acres claimed by him. The issue as to whether defendant has a title by limitation to any portion of the Pratt survey depends upon whether his actual possession on the 160 acres claimed by him includes any part of said survey, and this issue manifestly depends upon the true location of the lines of said survey. Upon this issue the testimony was conflicting. There is evidence sufficient to sustain the finding that a portion of defendant's improvements, including his dwelling house, was on the Pratt survey, and there is testimony which would authorize the finding that the dwelling house was north and west of the Pratt, and that no substantial portion of said survey was in the actual, visible possession of the defendant.

Upon this state of the evidence the trial court submitted two questions to the jury for their determination. These questions and the answers returned by the jury were as follows:

"1st. Does defendant Ben Hollis live on the land described in his answer and claimed by him in his plea of limitation?" To this question the jury answered, "Yes."

"2d. Is the north boundary line of the L. T. Pratt survey, as it was originally run or located by B. F. Mott in 1839, where the witness and surveyor W. B. Bean says and locates it to be, or where the witnesses and surveyor Blake say and locate it to be?" To this question the jury answered: "We find said line to be where W. B. Bean located it."

If the Bean line was the true line, as found by the jury, defendant's improvements were not north of the Pratt survey, as claimed by plaintiff.

The first assignment of error is as follows: "The court erred in submitting the case to the jury on the special issues on the motion of the defendant, the said charge being equivalent to withdrawing the case from the jury when the facts were disputed on every issue of the case." Under this assignment the appellant contends that the evidence raised the issue of whether appellee's improvements were not all west of the Pratt survey, and therefore the issue as to the true location of the west line of said survey should also have been submitted to the jury, and the finding of the jury as to the location of the north line was not a sufficient finding upon the issue of appellee's adverse possession to authorize a judgment in his favor.

It is clear that the findings of the jury upon the issue submitted

to them by the charge are not in themselves sufficient to authorize a judgment in appellee's favor, but the statute provides that in such case the additional facts required to support the judgment will be considered as found by the court, provided there is evidence in the record to sustain such finding. Article 1331, Sayles' Civil Statutes. As we have before said, the evidence is conflicting upon all the issues in the case, but there is evidence sufficient to sustain the finding that appellee's improvements are on the Pratt survey, and that he has held actual adverse possession of the portion of said survey included in the 160 acres claimed by him for a sufficient time to acquire title thereto by limitation. If the appellant desired other issues submitted to the jury he should have requested their submission, and having failed to make such request he can not complain that all the issues in the case were not submitted. Article 1331, Sayles' Civil Statutes.

The second, third, fourth and fifth assignments of error, which complain of the insufficiency of the evidence to sustain the verdict and judgment, are grouped and presented together. Our fact conclusion before stated disposes of these assignments. While it appears to us that the finding as to the location of the lines of the Pratt survey is against the preponderance of the testimony, we can not say that it is so against the overwhelming preponderance of the evidence as to be clearly wrong, and therefore we are not authorized to set aside such finding. The assignments complaining of the verdict and judgment upon this ground must be overruled.

No seasonable motion or request to have a surveyor appointed to locate the boundaries of the Pratt survey was made by the appellant, and the trial court did not err in refusing to grant a new trial in order that such survey might be made.

The 160 acres of land recovered by the appellee is definitely described by metes and bounds, and the fact that the field notes of said tract do not mention the Pratt survey, and that it does not appear from the description of the land given in the judgment how much of the Pratt survey is adjudged to appellee is immaterial. From the description in the judgment the land can be readily located and identified, and this is all that is required.

We find no error in the record which would authorize a reversal, and the judgment of the court below is affirmed.

Affirmed.

Writ of error refused for want of jurisdiction.

U. M. MOUNCE v. J. H. CROWSON ET AL.

Decided March 10, 1910.

1.—Juror—Previous Knowledge.

That a juror had as a grand juror previously investigated the evidence involved in a civil suit was not a legal disqualification; his silence when asked as to previous knowledge was not ground for new trial in the absence of showing that he was biased or the party complaining was injured.

2.—Bill of Exceptions to Evidence.

Where neither the bill of exceptions to the overruling objection to evidence

nor the statement of facts show what the testimony was nor that it was actually received, no ground for reversal is shown.

3.—Fraud—Innocent Purchaser—Charge.

Plaintiff sought damages for fraud committed by one defendant and recovery of property obtained thereby from purchasers alleged to have had notice of the fraud. A charge requiring a verdict for all the defendants if the purchasers had no notice of the fraud was error demanding reversal of the judgment in favor of the defendant from whom damages were sought for its perpetration.

Appeal from the District Court of Cass County. Tried below before Hon. P. A. Turner.

Hugh Carney, for appellant.—On failure of the juror to disclose previous information: Texas & P. Ry. Co. v. Elliott, 22 Texas Civ. App., 31; Hanks v. State, 21 Texas, 526; Hawkins v. Andrews, 39 Ga., 118, citing 3 Blackstone, page 363, and Columbus v. Goetchius, 7 Ga., 139; 24 Cyc., 278; 1 Thompson on Trials, sec. 60, notes and cases cited; 17 Am. & Eng. Ency. Law., 1131, citing Spear v. Spencer, 1 Greene (Iowa), 534.

Under the pleadings plaintiff would have been entitled to recover of defendant, Crowson, the $400 paid in cash and the value of the house and lot, even if Spivey and Stewart had bought in good faith and without notice. Mitchell v. Zimmerman, 4 Texas, 75.

Thomas N. Graham, for appellees.

HODGES, ASSOCIATE JUSTICE.—The appellant instituted this suit against the appellees, Crowson, Spivey and Stewart, in which he seeks to recover from Spivey and Stewart a house and lot in Atlanta, Cass County, and a judgment for $400 against Crowson. It appears from the record before us that Crowson was the owner of a patented device for making fish-traps and the right to sell the same. After his arrival at Atlanta he organized a private corporation for carrying on his business, and sold the appellant some shares of the stock, the consideration paid being the house and lot involved in this suit and $400 in cash. Appellant claims that, through the false and fraudulent representations made to him by Crowson, he was induced to pay the consideration mentioned, and that the shares of stock were worthless. Shortly after the lot was conveyed to Crowson he sold it to Spivey, Stewart and T. G. Wood. Subsequently Stewart purchased the interest of Wood, giving therefor his negotiable promissory note with a vendor's lien to secure its payment. Crowson answers generally and specially; and Spivey and Stewart, among other defenses, claim to be purchasers for value and without notice of any fraud in the transaction between Crowson and appellant. Upon a verdict of the jury a judgment was rendered in favor of all the defendants in the suit.

The first assigned error complains of the refusal of the court to grant a new trial, "because one of the jurors, to wit, S. H. Hood, had been a member of the grand jury which indicted Crowson, one of the defendants, for swindling, and as a member had heard all of the evi-

dence of plaintiff in this cause when said grand jury was investigating the matters on which said indictment was laid, though when plaintiff's attorney questioned the jury in this cause on their voir dire, and asked said panel of jurors if any of them had heard any of the facts in said cause, or knew anything about the facts in said cause, after fully explaining the nature of the suit, the said juror, S. H. Hood, remained silent, and neither plaintiff nor his attorney knew that said juror, S. H. Hood, had been a member of said grand jury." The foregoing is all that is stated in the motion with reference to the facts relied upon as disqualifying the juror. No affidavit is attached or referred to in which the facts are positively set out in support of the averments in the motion. Assuming that the motion as presented was sufficiently positive in the averment of facts to require the court's consideration without an accompanying affidavit, we do not think the reason given would justify granting the new trial. Having been a member of the grand jury under the circumstances alleged was not, in itself, a legal disqualification to sit as a juror in this case. The situation in which that position placed the juror was not such as would require the court to presume as a matter of law that he was biased thereby to the extent of total disqualification to pass upon the property rights involved in the civil action. It will be observed that the appellant does not claim in his motion that the juror was biased or prejudiced one way or the other. The grounds urged merely rest on the statement of an abstract proposition, in itself unsound, without any attempt to show injury resulting from the juror's past service on the grand jury. This is not sufficient. Had a positive legal disqualification been shown, a different question would have been presented. San Antonio & A. P. Ry. Co. v. Lester, 99 Texas, 214, 89 S. W., 752.

The facts are ample to sustain the defense of Spivey and Stewart upon their claim of purchase for value without notice of any fraudulent conduct affecting the contract between the appellant and Crowson. Appellant complains of the action of the court in permitting the witness Smith to "testify as to the contents of a certain promissory note." The bill of exceptions referred to in appellant's brief fails to point out the particular testimony to which he objected. It says: "The plaintiff objected to the court allowing witness Smith, for the defendants, to testify as to the contents of a certain promissory note which was shown to be in the possession of said witness, on the ground that the note itself was the best evidence, and no predicate having been laid that said note was lost or misplaced, which objections the court overruled, and counsel for plaintiff excepts." The testimony objected to is not set out in the bill of exceptions, nor does the bill indicate where this may be found in the record. It also fails to state whether or not the testimony objected to was, in fact, given before the jury, but merely says that "the court overruled the objection." This omission, however, might not be considered fatal if the statement of facts showed that the objectionable evidence was heard by the jury. We are unable to say that this was the case. The assignment refers to a "certain promissory note," without giving any means of identification. Neither does it state what portion of the testimony relating to the contents is referred to. We think the bill

was not a sufficient compliance with the requirements of the law. International & G. N. Ry. Co. v. Leak, 64 Texas, 654; Gulf, C. & S. F. Ry. Co. v. Brown, 16 Texas Civ. App., 93, 40 S. W., 609; Hereford Cattle Co. v. Powell, 13 Texas Civ. App., 496, 36 S. W., 1037; Jamison v. Dooley, 98 Texas, 206, 82 S. W., 780.

However, we think the case should be reversed as to Crowson for the error committed against the appellant in charging the conditions under which a verdict should be returned for the defendants in the suit. The court instructed the jury that if they found that Spivey and Stewart bought in good faith and without notice, to find in favor of all the defendants. This was error, for the reason that the appellant may have been entitled to a recovery against Crowson for the $400 sued for, notwithstanding Spivey and Stewart were entitled to retain the house and lot on the grounds of their purchase for value and without notice.

There were also errors in some other portions of the court's charge which may not occur upon another trial, and for that reason will not here be discussed.

For the error indicated the judgment of the trial court will be reversed and remanded as to the appellee Crowson, and affirmed as to the appellees Stewart and Spivey.

Affirmed in part and in part reversed and remanded.

Writ of error refused.

SULLIVAN-SANFORD LUMBER COMPANY v. MRS. CLARA COOPER ET AL.

Decided March 10, 1910.

1.—Continuance.

A second application for continuance should show that the evidence desired can not be procured from any other source; failing in this it is addressed to the discretion of the court: and abuse of this did not appear where the testimony of the absent witnesses on a previous trial had been preserved and was permitted to be read in evidence from the stenographer's notes.

2.—Same—Second Application.

An application for continuance is treated as a second one, though the first, made at a former term, was overruled.

3.—Master and Servant—Vice-Principal.

The status of a foreman having authority to direct and control subordinates in their work as a vice principal with respect to them, is not concluded adversely to such relation by the fact that his power to employ and discharge was subject to the approval of the president of the employing company.

4.—Same—Case Stated.

The foreman in charge of a lumber mill and having authority to direct the work of its employes, the machinery being stopped to repair a break, sent an incompetent and inexperienced employe to do certain work among intricate machinery with which he accidentally worked a lever which set the machinery in motion and caused the death of an employe engaged in its repair. The negligence relied on in a suit by the widow to recover for his death was in detailing the incompetent servant for such service. Held, that a requested instruction denying recovery in case the foreman did not have authority to hire and discharge employes without consulting his superior officer was properly refused.

5.—Vice-Principal—Injuries Causing Death.

Negligence of a vice-principal (foreman of a lumber mill) in performing a nondelegable duty of the employer to his subordinate will support a recovery against the latter under the statute (Rev. Stats., art. 3017, sec. 2) for death caused by the negligence of such employer.

6.—Negligence—Incompetent Servant.

The selection of an incompetent servant to do work about intricate machinery of the relations and details of which he was ignorant, and which by reason thereof he accidentally set in motion, causing the death of another employe engaged in repairing it, was properly left to the jury to determine the question of negligence in such selection as one of fact.

7.—Same—Contributory Negligence—Assumed Risk.

Evidence considered in case of a servant killed while repairing a break in the machinery of a lumber mill by the starting of the machinery in motion through negligence attributable to the employer, and held to disclose no evidence of the contributory negligence on his part nor anything constituting an assumption of the risk by him as matter of law.

8.—Charge—Omission.

Appellant can not complain of a charge which merely directs a verdict in his favor on the finding of certain facts.

9.—Knowledge of Servant's Incompetency—Charge.

Evidence as to the master's knowledge of the servant's incompetency to perform the work he was directed to do, about complicated machinery which he did not understand, considered, and held that it was not reversible error for the court in his charge to assume the existence of such knowledge.

10.—Requested Charge—Immaterial Issue.

A requested instruction on the issue as to the competency of the servant was properly rejected where it made the test of his ability to do the simple act he was directed to perform, when the issue was as to his fitness to perform it among intricate machinery of the details and relations of which he was ignorant.

11.—Contributory Negligence of Fellow Servant.

The master is not relieved from responsibility to a servant for injury by his negligence because the negligence of a fellow servant of the injured person contributed to the result.

12.—Charges.

Requested instructions were properly refused where the matters were covered by the charge given or where those asked were inapplicable to the issues made by the evidence.

Appeal from the District Court of Morris County. Tried below before Hon. P. A. Turner.

Harry P. Lawther and *Chas. Todd,* for appellant.

J. M. Henderson, S. I. Robison and *Hart, Mahaffey & Thomas,* for appellees.

LEVY, ASSOCIATE JUSTICE.—On November 18, 1907, R. F. Cooper, a machinist and millwright in the employ of appellant at its lumber mill, while in the work of removing the broken floor-plate of the "nigger," or tooth-bar, of the mill machinery, was instantly killed.

The suit is by the surviving wife, children and father of the deceased, for damages on account of his death, alleged to have been caused by appellant's negligence. The ground of negligence, submitted by the court to the jury, is alleged to be the act of appellant's foreman, a vice-principal, in knowingly directing an incompetent and inexperienced person, ignorant of the character and use of the machinery about and amidst which he was instructed to work and come in contact, to go underneath the floor and unscrew the end nuts and bolts of the broken floor-plate which the deceased at the time, on the first floor, was endeavoring to repair. It was alleged that while the person, as directed by the foreman, was endeavoring to do the work assigned him, and while necessarily climbing around to do such work, he came in contact with the end of the lever next to the valve which operates the loader, and thereby let steam escape into the cylinder and operate the arms of the loader and throw a heavy gum sawlog which was on the loader at the time upon the deceased, killing him. The appellant answered by general denial, plea of contributory negligence, assumed risk, negligence of a fellow servant causing the death. In accordance with the verdict of a jury, judgment was rendered in favor of the wife and children against appellant, and in favor of appellant against the father of deceased.

The evidence shows that appellant, a private corporation, owned and operated a sawmill plant, of which E. B. Wilson at the time was the foreman, having authority from and charged with the duty by appellant to direct and control and have full charge and supervision of the operations and work of all the other employes at the mill, and to employ hands and to discharge hands, but subject to the disapproval of the president of the company. This plant was made up of modern and complicated machinery propelled by steam. Among the contrivances used to save labor and accelerate its business of manufacturing lumber were a steam loader and steam tooth-bar, called in the evidence a "nigger." The former was made up of, among other things, a number of arms, or standards, attached to a shaft which rested alongside, near and parallel with the saw carriage track, at the foot of an inclined plane, called a "skidway." The arms or standards normally stood rigid and upright, and were used to catch and hold logs which rolled down the skidway, and to keep them from rolling on the carriage or carriage track until such time as, in the operation of the mill, a log was needed upon the carriage, when, by means of the application of steam power to the machinery in part making up the construction of the loader, the arms or standards were lowered, and the log rolled on to the carriage. The steam "nigger" consisted of an upright bar provided with teeth, which worked upward and downward through the floor, and near the carriage track, and between the carriage track and loader; it was propelled by steam power and used for turning and adjusting logs while being sawed, after they had been placed upon the carriage. The machinery by which these instrumentalities were operated was situated underneath the floor, upon which rested the carriage track, and the steam used in its operation was applied through valves to which levers were connected, the steam, by means of the valves, being allowed to pass into cylinders. One of

such cylinders operated the loader, and two others operated the "nigger." The levers connected with the steam valves; at least, the loader levers were, in turn, connected with uprights which protruded a short distance through tre floor at the sawyer's stand, and were provided with stirrups, so that steam could be applied to the loader or "nigger" by slight pressure by the sawyer's or operator's foot. The machinery which made up the construction of these instrumentalities was complex, and the relation of one part to another was nicely adjusted, and it was capable of being quickly and easily operated by means of slight pressure applied to the levers, through the uprights projecting through the floor at the sawyer's or operator's stand. Steam was applied to the machinery operating the loader by means of a lever about sixteen feet in length, which was suspended underneath the floor from a fulcrum about its center. One end of the lever was attached to a valve through which steam escaped into the cylinder operating the loader, while to the other end was attached an upright protruding through the floor, to which was attached a stirrup as a means of its operation. The arms or standards were lowered by the application of steam power, and upon relaxation of the pressure assumed and retained a normal, rigid and upright position. This lever was above and about four feet back from the rear, and about seven feet from the front "nigger" cylinder. On the day of the injury in suit the floor-plate of the tooth-bar, or "nigger," broke, and Wilson, the foreman of the mill, as was his duty, caused the mill to be shut down, and not longer for the time operated, and called and directed the deceased, as was his duty, to repair it. At this time a large gum sawlog was resting in the arms of the loader, and deceased, as was the proper way for the performance of his duty, stooped down between the log, which was about two feet distant in front of him, and the carriage track, to make the repairs, and was unscrewing the nuts from the bolts on the floor-plate. Deceased had taken out two bolts and had started to take out another when Wilson, the foreman, directed Ned Barlow, an employe of the mill, to go below the floor and unscrew the nuts from the ends of the bolts which were underneath, and Barlow obeyed the instructions of the foreman. Barlow was a block-setter at the mill, but was not a machinist, and, according to his own evidence, did not know anything about machinery and had never before done that particular kind of work in such place as directed, and did not know how those levers operated when he went down under there, and did not know that if he came in contact with any of those levers it would throw the steam on, and did not know at that time what effect it would have to touch any of those levers, and did not know anything of the machinery that was down under that place. While deceased was sitting on the edge of the log-deck, and stooping over, removing the last nut from the floor-plate, the cylinder operating the loader suddenly took steam and threw the log from the deck on him before he could move out of its way, thereby instantly causing his death. The evidence is sufficient to warrant the inference and finding which is involved in the general verdict of the jury, and which we assume, in support of the verdict, to be true, that Ned Barlow, while doing the work assigned him by the foreman, in moving his position from

one place to another underneath, and in necessarily swinging around a post to get in position to do his work underneath, struck his shoulder against the end of the lever next to the valve which operates the loader, and thereby let steam escape into the cylinder and operate the arms of the loader and throw the log upon deceased. Wilson, the foreman, at the time he sent Barlow beneath and among the machinery, knew, it appears, according to his own testimony, that Barlow was not a competent and experienced person to do such work among such a complex and delicate situation of machinery as was there, and of which Wilson knew. We therefore conclude that there is evidence sufficient to warrant the finding that appellant, acting through its foreman, a vice-principal, failed to exercise ordinary care in selecting a competent person to do the work he assigned to Ned Barlow, and the foreman's act was negligence, as alleged in the petition, proximately causing the death of the deceased, and that the deceased was not guilty of contributory negligence, did not assume the risk as plead, and the evidence supports the amount of the damages awarded.

After stating the case.—The appellant made an application for continuance. Appellees filed a contest to the application, and the court, after hearing evidence, overruled the application, and to the action of the court in denying a continuance appellant assigns error. The application for continuance must be held, we think, in the case as a second, and not a first, application, and as a second application it does not meet the requirements of the statute, in that it fails to allege that the testimony to be elicited from the witnesses "could not be procured from any other source." Art. 1278, Rev. Stats.; Campion v. Angier, 16 Texas, 93, 245; Rowland v. Wright, 64 Texas, 261. Failing in its sufficiency in statutory requirement, as it does, then the application rested for ruling in the sound discretion of the court; and, looking to the application and the evidence heard by the court, we do not feel warranted in holding that the court abused his discretion when he denied the continuance. It further appears in the record that the witnesses on account of whose absence the continuance was sought had testified fully on previous trials of the case, their testimony had been taken and transcribed by the official stenographer of the court, and on the instant trial appellant, with the consent of appellees, was allowed to introduce the testimony of such witnesses given upon former trials. In the absence of a statutory showing, as in this case, no reversible error could be predicated, we think, on the court's action, as all the witnesses could have testified to, if personally present, it appears was in evidence before the jury. However much it might be desired by the parties to have the witnesses personally present to testify, yet, under the circumstances as above, it could not be said that their absence alone worked injury. The application as made at a previous term, as it appears in the record with a judgment of the court and with specific grounds for affirmatively overruling it, accomplished the purposes it sought, and would be treated in legal force and effect, we think, in the absence of a showing of an affirmative withdrawal or abandonment at the time, which does not appear, as an application for continuance duly filed, properly presented and over-

ruled by the court. Consequently, in the record the instant application, as stated, should properly be held as having the legal status of a second application. The first and second assignments are overruled.

By the third assignment appellant complains that the charge of the court upon the question of vice-principal failed to correctly state the rule, and that appellant's requested charge upon the subject should have been given. In this connection the evidence showed that E. B. Wilson was appellant's foreman at the mill, having authority and charged with the duty to direct and control and supervise the operation and work of all the other employes at the mill, and to employ hands and discharge them, but subject to the disapproval of the president of the company. The court charged the jury that if they found that Wilson was the foreman, and that the other employes engaged in the operation of the mill were amenable to his orders and subject to his control and direction, and that he had authority from appellant to control and supervise their work and to assign them their work, and to employ and discharge such employes, then Wilson would be a vice-principal of appellant in the operation of the mill. The special charge directed the jury to find that Wilson would be a fellow servant as regards deceased, and not a vice-principal of appellant, if they found from the evidence "that E. B. Wilson at the time of the death of R. F. Cooper did not have the power and authority to hire and discharge employes at his will, without consulting any other person or superior officer of defendant company." We do not think the assignment presents error in the case, and it is overruled. If Wilson had authority as foreman of the mill, as he had, to control the hands and supervise their work, and had authority, as he had, to take Ned Barlow from his regular work of block-setting and assign him to the work of assisting to repair the broken floor-plate, which he was doing at the time Cooper was killed, then it must be held, we think, that Wilson, in changing Barlow from his regular duties and directing him "to go below and unscrew the nuts from the bolts in the floor and drive the bolts up," was performing an act under his employment as foreman that he had authority to do, and that his act, as to the deceased, was the act of the master, and not a mere act of fellow service. 2 Labatt on Master and Servant, sec. 572; Lantry-Sharpe Mfg. Co. v. McCracken, 117 S. W., 453; Suderman & Dolson v. Kriger, 50 Texas Civ. App., 29, 109 S. W., 573; Missouri P. Ry. Co. v. Patton, 26 S. W., 978; Bering Mfg. Co. v. Femelat, 35 Texas Civ. App., 36, 79 S. W., 869; Young v. Hahn, 96 Texas, 99, 70 S. W., 950. As warranted by the rule announced in the cases cited the special charge was properly refused, because, we think, it could not be held in the case that Wilson's status as vice-principal, as regards deceased, would legally be taken away and destroyed, as the special charge offered instructed, by the fact alone, as other facts of his authority and power appeared in the evidence, that his power of hire and discharge could only be exercised by him subject to the approval of the president, and the latter was the only issue that related to his power and authority of hire and discharge. It might be remarked that the effect is the same, whether the foreman has power to discharge the employe at once or only after consultation with the presi-

dent; the procuring cause of his discharge in either case is disobedience to the foreman, which in such case is, legally speaking, disobedience to the commands and authority of the master. In International & G. N. Ry. Co. v. Hinzie, 82 Texas, 623, 18 S. W., 681, a foreman of the paint shop could discharge only with the consent of the superintendent of the car department. In Zintek v. Stimson Mill Co., 37 Pac., 340, Nelson, who was in charge of the mill, and whose duty it was to superintend the piling of lumber therein, and under whose orders were the workmen engaged in piling, was a vice-principal, though in hiring and discharging workmen he reported to the general superintendent and obtained his sanction therefor. We do not mean to be understood by the remark as saying that in a given and proper case, which the instant case under the facts was not, the absolute and unrestricted power of hire and discharge might not be a material factor in the inquiry of whether a mere foreman stands above or below the line which separates him from a fellow servant.

By the sixth assignment it is contended that the court erred in refusing to give a peremptory instruction to the jury to find for appellant. If it appears from the evidence, as we think it clearly does, as stated before, that Wilson was a vice-principal of the appellant company, as regards deceased, in the act charged as negligence, and the act thus performed by him was the non-delegable duty of the appellant to deceased, as it was, then it could not be held, we think, that the death of Cooper was not within the statute giving a cause of action for death caused by "the wrongful act, negligence, unskilfulness or default" of another. Art. 3017, sec. 2, Rev. Stats.; Citizens' Tel. Co. v. Thomas, 45 Texas Civ. App., 20, 99 S. W., 879; San Antonio Gas & Electric Light Co. v. Badders, 46 Texas Civ. App., 559, 103 S. W., 229. It was properly a question, we have no doubt, for the decision of the jury, in all the circumstances of the case, as to whether the act of Wilson was negligence in knowingly selecting and directing to do the work assigned an employe who was inexperienced and incompetent because ignorant of the working and of the effect of touching or coming in contact with the complex and delicate situation of the machinery below. 1 Labatt on Master and Servant, sec. 194; 4 Thompson on Neg., sec. 4962; International & G. N. Ry. Co. v. Martinez, 57 S. W., 689; Tel. Co. v. Coote, 26 S. W., 912; Missouri Pac. Ry. Co. v. Patton, 25 S. W., 339, 26 S. W., 978; Blackman v. Thomson-Houston Elec. Co., 29 S. E., 120. There is no evidence to support contributory negligence, especially so as a matter of law, and we do not think it could be held, as a matter of law, that appellees were precluded from a recovery because of assumed risk. It does not appear that deceased knew of Barlow's want of knowledge as to the working of the machinery below or the effect of touching the levers, and it does not appear that his former association with Barlow was such as to warrant the holding, as a matter of law, that he had equal means of knowledge with the foreman, or could have learned by the exercise of ordinary care, of Barlow's unfitness or incompetence to work amidst or about complex machinery. Deceased was working upstairs, and could not, it appears, see Barlow below, and how he was moving amidst the machinery. It was properly a question of fact for

the jury as to whether the particular result of the negligence charged could have, under the circumstances of the case, at the place and amidst the surroundings, been reasonably anticipated at the time by Wilson in the use of ordinary care. Mexican Nat'l Ry. Co. v. Mussette, 86 Texas, 708, 26 S. W., 1075.

The appellant can not complain that the court instructed the jury that appellees could not recover if deceased knew, actually or constructively, that Barlow was not competent and skilled to do the work assigned him by the foreman, and the fourth assignment is overruled. The fifth assignment is overruled, as, considering the state of the proof in the record, which the court is authorized to look to, and the charge of the court as a whole, no reversible error could be predicated. In a succeeding portion of the charge the jury was specially directed to find for appellant if Wilson used ordinary care to ascertain if Barlow was a competent person to do the work assigned, taking into consideration all the evidence. This authorized and required a finding in appellant's favor if Wilson was not negligent in ascertaining Barlow's incompetency. That Wilson exercised no care to ascertain anything relative to the competency of Barlow to do the new work at the place and its surroundings assigned him, and did, by reason of his knowledge of Barlow's occupation, know of his unfitness, is by Wilson's evidence established, if not admitted. Barlow, by his evidence, admits his incompetency at the time to do the particular work at such place and surroundings, as seen by reference to his evidence. The court was well warranted, we think, in assuming, as a fact proved in the case, that Wilson knew of Barlow's incompetency at the time he assigned him to do such work, and the court in so assuming did not, we think, commit reversible error in the case.

Considering that the material inquiry was the competency of Barlow to do the new work assigned at the particular place with its surrounding machinery, which required skill or particular knowledge of in working around and in the midst of same, and not simply knewledge of how to unscrew nuts, there was no error in refusing the special charge complained of in the fifteenth assignment.

There was no error in refusing the special charge complained of in the fourteenth assignment, as erroneous and misleading to the jury, because only reasonably capable of a construction by the jury that if the act of Wilson in sending Barlow was negligence, and such negligence was the proximate cause of deceased's death, that still appellees could not recover if Barlow's coming in contact with the lever tripped the loader. Appellant would not be relieved of liability if its negligence, together with the negligence of Barlow, produced the injury. International & G. N. Ry. Co. v. Zapp, 49 S. W., 673.

The refusal to give the special charge complained of in the tenth assignment was not error, as covered in the main charge, and would have been repetition.

There was no error in refusing the charge complained of in the eighth assignment instructing the jury to find for appellant if the appliances furnished for repairing the floor-plate were reasonably safe and suitable for the work, as inapplicable to the facts, and as no recovery in favor of appellees was predicated in the main charge upon

such a ground of negligence. While Cooper was repairing the floor-plate, yet it is conclusive that he was not injured by or through any of the appliances used in or for the repair work being done.

The court in the main charge specifically and affirmatively informed the jury that deceased assumed the risk, and appellees could not recover, if he knew, or by ordinary care would have learned, that Barlow was incompetent in the place he was to work or at the particular work assigned him by the foreman, or if the danger of working at the repair work immediately in front of the loader, upon which a large log was lying, was open, obvious and apparent to him, taking into consideration his experience and knowledge of the machinery both above and below the floor upon which he was working. This, we think, covered all issues of assumed risk arising on or supported by the facts of the case, and special charges Nos. 9 and 10, complained of in the eleventh and twelfth assignments, were properly refused. Deceased did not assume the risk incident to the negligent performance by the appellant, through its foreman, of the duties it was owing him, as the tenth special charge would involve, but only the risks of which he had knowledge, actual or constructive, and the ninth would have been repetition.

All the remaining assignments have been considered, and should be overruled, we think.

The judgment was ordered affirmed.

ON MOTION FOR REHEARING.

We are of opinion, as before, that Wilson was a vice-principal of the appellant company, as regards deceased, in the act charged as negligence, and the act thus performed by Wilson, in knowingly selecting and directing to do the work assigned an employe who was inexperienced and incompetent because ignorant of the working and of the effect of touching or coming in contact with the complex and delicate situation of the machinery below, was the non-delegable duty of appellant company to deceased. The liability of appellant is predicated upon this ground of negligence. There was no error in refusing a peremptory instruction. We make the additional findings that deceased, while he was at work, heard Wilson tell Barlow to go below and unscrew the nuts from the bolts underneath the floor-plate, and he knew about the place at which Barlow would have to go to perform this work, and how he would have to go to get there. Deceased knew Barlow, and that he was engaged and worked as a block-setter at the mill, and knew the duties of a block-setter, and had seen Barlow at work setting blocks. But it does not appear that deceased knew Barlow's knowledge of the working or effect of touching or coming in contact with the machinery below. The hole in the floor-plate through which the tooth-bar protruded was three feet long and six inches wide. Through this hole Barlow could have been seen by deceased and Wilson, and where he was and what he was doing. Deceased was engaged at his work when he was injured. We conclude, as before, that deceased was not guilty of contributory negligence as a matter of law

or fact, and his injury did not arise from or through any risk that he assumed as a matter of fact or law.

The motion for rehearing was ordered overruled.

Affirmed.

Writ of error granted.

H. E. PAYNE v. W. W. LINDSLEY.

Decided March 10, 1910.

1.—Conversion—Mortgage.

In an action for conversion of plaintiff's stock of goods by defendant, who held them under a contract which he claimed to be an absolute sale in discharge of plaintiff's debt to him, the latter claiming it to have been a mortgage, no charge requiring proof of conversion by defendant was necessary. The nature of the claim asserted by him amounted to conversion if the contract was found to be a mortgage.

2.—Same—Damages.

In an action for conversion of mortgaged property by the mortgagee, who claimed that the contract was one of absolute sale, the measure of damages was the value of the goods at the time they were transferred less the debt.

Appeal from the District Court of Lamar County. Tried below before Hon. T. D. Montrose.

Moore & Park, for appellant.

Allen & Dohoney and *B. B. Sturgeon,* for appellee.

HODGES, ASSOCIATE JUSTICE.—This is an action instituted by the appellee for damages for the conversion of a stock of goods. The testimony establishes the following facts: The appellant, Payne, was a merchant doing business in the town of Blossom, in Lamar County. On October 29, 1906, he sold his stock of goods, including some store fixtures, to W. W. Appleton, who was at the time representing himself and the appellee in the purchase. The consideration agreed on was $6,200, payable as follows: $1,000 cash, $1,000 within one week from date of sale, and the balance within thirty days, to be paid from the proceeds of the daily sales. Appleton paid $1,000 in cash, and made other payments on different dates thereafter, but on the 25th of December following still owed $1,698.60. According to the testimony of the appellee, which was not disputed, he furnished the money with which Appleton made the cash payment, and they became partners in the business. On December 25, 1906, Appleton and the appellee made an agreement with the appellant, Payne, by which they turned over to Payne the entire stock of goods then on hand. The sum due Payne at that time, together with some outstanding debts which Appleton and the appellee owed to other parties, amounted to $2,213.60. The testimony is conflicting as to the terms and meaning of the contract by which Payne took possession of the stock of goods. The appellee claims, and so testified, that at that time Appleton was indebted to him in the sum of about $1,500, and that both of them

owed Payne $1,698.60; that the firm also owed debts to other parties, amounting to $674.79, and that the goods were turned over to Payne to secure both debts. He says: "Those goods were turned over to Payne first as security to himself for what we owed, he to get the money out of them. There was an invoice taken when the goods were turned over to him, to find out how much was in the store, to know how much was put over into his hands. That invoice amounted to $7,813.63. The agreement between Payne and myself in regard to the debt I owed him was: he was to get his money first out of the goods; that was to secure himself; and then what was left I was to get what I could out of it. Payne could not dispose of these goods before the 1st day of March, according to the contract. In the meantime it was our object to get buyers and sell it out." He further stated: "I had an option on the goods on or before the 1st day of March to take the goods back by paying the amount which was due Payne, which was estimated to be $2,213.60." There was offered in evidence in that connection the following written instrument: "I will enter into contract to sell on or before March 1, 1907, all unavoidable accidents allowed, all the stock and fixtures and insurance, fixtures to be the same as sold to Appleton, and rent on storehouse and fixtures for the year 1907, for $2,213.60, and will keep all sales and all money spent by the business; and should the cash took in be greater than that spent, then the difference will be allowed on the above amount. But, to the contrary, should it be less, then the difference will be added to the above amount. Taxes for 1907 to be paid by W. W. L." The testimony shows that this instrument was presented by Payne as evidencing the option which he accorded to the appellee and Appleton at the time the goods were turned over to him. With reference to this the appellee testified that, after the contract to deliver the goods to Payne had been made, they discussed the feasibility of getting up a stock company to buy the stock, and Payne suggested that he would give them an option if they so desired. It appears that this instrument was then prepared and accepted. Payne testified that, previous to the 25th day of December, 1906, he had not received his payments according to the agreement, and was not satisfied with the conduct of the business; that he was sent for by Appleton and went to the store to see him; that Appleton proposed to sell him the stock of goods, which he thought at that time was worth about $5,000; that the indebtedness of the firm to other parties was ascertained to be $674.79. In the presence of Lindsley, the appellee, he accepted Appleton's offer to take the goods, receipt him against the debt and pay the outstanding bills referred to. The following memorandum of the sale was written and assented to by both Appleton and Lindsley: "To buy stock and fixtures from W. W. Lindsley and W. W. Appleton, and insurance on same, for $1,698.60, interest $15, total $1,713.60, and assume the debts for goods received in the house and not paid for, and will pay for goods on the road when received if they prove satisfactory; otherwise I will return to shippers." Then follows the amount in detail due to other creditors. Payne further testified that after the stock had been sold and transferred to him Appleton suggested the practicability of getting up a stock company to buy the

goods, and he told Appleton that if it was so easy to get up a stock company he would give him an option; that then they agreed on the option, and a memorandum of the agreement was written out and assented to by them. Payne further testified that the goods were invoiced by him for the purpose of insurance; that he took down the articles in a small day book as they were called off by persons assisting in taking the invoice, and that the value of the goods as shown by that invoice did not represent their true value; that the stock was not worth over forty cents on the dollar. Payne further testified that, during the time he had charge of the store under their agreement, he put in new goods to the amount of $4,382.64; that this amount was necessary to keep up the stock; that during the months of January and February he sold $1,113 worth of goods; that counting the amount of new goods purchased and the old debt, the exercise of the option would have required plaintiff to pay him approximately $6,500. He also stated that he was willing, ready and able to deliver the stock of goods at any time between December 25, 1906, and the 1st day of March, 1907, had they tendered him the amount due under this contract. The evidence fails to show that the appellee at any time offered or tendered to Payne the amount due according to the terms of the option given. It does show that the appellee, accompanied by his attorney, had a conversation with Payne about the 1st of March regarding the goods; that Payne told them it would take $6,500 to get the stock, and that if they would pay him that amount he would get out. He refused, however, to permit an invoice except on condition that they would deposit $500 as a guaranty that the goods would be taken. This was declined, and shortly thereafter this suit was filed. A trial before a jury resulted in a verdict in favor of the appellee for $1,-214.80.

The cause of action asserted by the appellee is a claim for damages for the conversion of property delivered to the appellant as security for the payment of a debt. The defense is that the property was taken in satisfaction of the debt, and not as security. The issues are well defined in both the pleadings and the evidence. The rights of the parties turn upon the terms and construction of the contract made between them on the 25th of December, 1906. If the goods were delivered to Payne as security for his debt, he to dispose of enough of them to satisfy his demand, and then return the remainder to the appellee, Payne was but a mortgagee in possession, having only a special property in the goods, and was charged with the execution of the trust which he had undertaken. On the other hand, if he took the goods in satisfaction of the debt due him by appellee and Appleton, then under the evidence he has been guilty of no wrongful appropriation of the property. The testimony conclusively shows that the appellee failed to avail himself of the option given to repurchase the goods within the time limited in the written contract. The testimony as to the terms of the original contract was conflicting, but the jury settled the conflict in favor of the version given by the appellee. Regarding the possession of Payne as only that of a mortgagee, or pledgee, the exercise by him of any dominion over the property inconsistent with the rights of the mortgagor, or with the relations he justly sustained

to the property, would amount to a conversion if the mortgagor elected to so treat it. The latter might then sue for his damages without tendering the amount due. Lamb v. Reily, 34 N. Y. Supp., 235; Watts v. Johnson, 4 Texas, 315; Lucketts v. Townsend, 3 Texas, 127; Soel v. Hadden, 85 Texas, 188, 19 S. W., 1087; Jones on Pledges, secs. 571-575. The testimony is undisputed that Payne claimed to own the property absolutely, and it was unnecessary to submit the issue of conversion to the jury if they found that he held the goods as security only. Therefore we do not think there was any error in that portion of the court's charge complained of in the first assigned error.

The court gave the following charge on the measure of damages: "If you find for the plaintiff you will allow him the market value of said goods as delivered on or about the 25th day of December, 1906, less the debt due by plaintiff to the defendant and the debts assumed by defendant to pay to other parties for plaintiff at the time of the delivery of said goods." By way of objection to this charge, it is claimed that Payne had a legal right to hold the possession of the goods from the 25th day of December, 1906, at least till March 1st following, and even longer in the event the option given was not taken advantage of; that the proper measure of the appellee's damages, if he was entitled to recover any, would be the value of his interest in the goods on the date last mentioned, and this measure would be the difference in the value of the stock of goods in stock on the 1st day of March, 1907, and the amount due Payne less the amount which Payne had received for goods sold from the time he took charge of the stock until March 1, 1907. Appellee's objection is based upon the assumption that the conversion did not in reality take place till the 1st day of March. The right of the appellee to recover his damages—that is, the difference between the value of the stock of goods and the sum due Payne—arose the instant the conversion took place, and the amount due him should be determined by the value of the goods less the amount due Payne at that time. We see no good reason why March 1st should be selected as the date of the conversion. There was nothing in the original contract of bailment which terminated the right of possession in Payne on that date. According to that agreement, he had the right to continue in possession till he had disposed of enough of the goods to satisfy his demand, or till the same had been paid in other ways. Neither of these contingencies happened at that time. It is true that on March 1st he announced his claim of ownership; but, according to his pleadings and testimony, he dates this hostile claim from the time he first obtained possession of the stock—December 26, 1906. Hence, we may safely assume that it was clearly shown that the conversion took place on that date, and the court properly selected that as the time for determining the value of the goods converted.

The propositions presented in the remaining assignments are sufficiently involved in the questions we have discussed to dispense with any further consideration of them.

The judgment of the District Court is affirmed.

Affirmed.

W. C. BURNS v. MARY F. BURNS.

Decided March 10, 1910.

1.—Divorce—Property Rights.

Where a divorce is refused the court is left without power to adjust the property rights of husband and wife.

2.—Husband and Wife—Support.

The wife can not maintain an action to require the husband to support her except by way of alimony in a suit for divorce, or by action in the County Court under art. 2979, Rev. Stats., for an allowance for support out of her separate property. But she may maintain injunction against control or management of her separate property by a husband who has abandoned her and repudiated his duties.

3.—Same—Judgment.

Where a suit by the wife sought divorce from the husband and injunction against his management of her separate lands on the ground of abandonment and nonsupport, the jurisdiction of the court, divorce being refused, was limited to the relief which could be granted under the prayer for injunction. It had no power to award to appellee the possession and control of her separate lands subject to an annual payment to the husband as rent for his community interest therein by virtue of improvements made on such lands.

Appeal from the District Court of Fannin County. Tried below before Hon. Ben H. Denton.

McGrady & McMahon, for appellant.

H. G. Evans, for appellee.

LEVY, ASSOCIATE JUSTICE.—The suit was by the wife against the husband for divorce, on the ground of cruel treatment in abandoning her in her incurable ill health without cause, and refusing to care for her or contribute in any way to her support and maintenance, and in the alternative, if divorce be denied, for a decree enjoining her husband from exercising control over her separate property of 113 acres of land, upon the ground that the income therefrom was the only means of support left her, and the husband was interfering with her support therefrom and claiming and threatening to apply all of the same to his own personal use, leaving her wholly destitute and dependent upon the charity of others. The appellant answered by general denial, and admitting that the 113 acres was the separate property of his wife, but alleging permanent and valuable improvements made thereon with community funds. The case was tried to the court without a jury, and a decree was entered denying a divorce but awarding to appellee the possession and control of the land, charged with the payment to appellant of $30 per year as rent for his community interest, "so long as said parties may live without any decree of divorce or other adjustment of their interest in said land."

After stating the case.—There is no complaint as to the refusal to grant the divorce, but for specification of error the appellant chal-

lenges the decree of the court in awarding the possession and control of the land to his wife as against him. The decree as entered, we think, was not in accordance with the relief asked for by the pleading, and failed to decree with respect to the relief asked for, and is so far erroneous as, in that respect, to require the judgment to be reversed and the case remanded for another trial. The petition, as seen, sought a divorce, and in the alternative a decree enjoining the husband from control of the wife's separate property. The trial amendment is considered, as it should be, as supplemental allegations to the original. The original petition prayed, aside from divorce, "that if, in the judgment of the court, such divorce can not be lawfully granted, then that defendant be perpetually restrained from in any manner interfering with plaintiff and with the separate property or the rents arising therefrom, but that same be set aside for the support and care of this plaintiff." Thus there were before the court two distinct proceedings. The appellee was asking relief against her husband first by divorce, and if that relief be not granted, then next by injunction against the abuse of his powers and rights as a husband in the control of her separate property to her injury. The jurisdiction of the court was invoked to grant an injunction on the alternative relief, and the District Court has jurisdiction to grant injunctions. Of course, the court had jurisdiction to try the divorce, and, if granted, to further make decree as to the adjustment of the property rights of the parties. But if the divorce on hearing be denied, then the court was without power in such suit for divorce to otherwise adjust the property rights of husband and wife than fixed by law. Upon denial of the divorce the property rights of the husband and wife must be left by the court as they stood at the time of the application for divorce, for the parties would still legally remain husband and wife. It is thus plain that, after refusal to grant a divorce, the power of the court to adjust and settle property rights of the husband and wife ended. Any decree attempting so to adjust them, as in this case, was void after refusing the divorce. But the power of the court to hear and determine the next relief sought was invoked and continued by means, as stated, of an application for injunction. The petition, we think, in respect to the matter in hand, is capable of the construction only of being an application for injunction. Its sufficiency against special exceptions is not here prejudged. The jurisdiction of the court being invoked by the application for injunction, the court had the power to hear and determine the issues necessary to decree the relief and extent of the relief. The case of Dority v. Dority, 96 Texas, 215, 71 S. W., 950, decides the right of the wife to restrain the husband from exercising the control given him by statute over her separate estate where the husband has repudiated his duties and is asserting only the rights and powers of his position as husband for his own selfish purposes and to her detriment. That case discusses and distinguishes the several rights of the wife that might be well to impress here. As stated in this case, it is a fixed rule of law in this State that the wife can not maintain an action against her husband to require him to support her, except by suit for divorce or a proceeding under article 2972, Revised Statutes. It is not necessary to

discuss that alimony in a divorce suit pending the determination of the divorce is a proceeding to compel proper allowances for the time. The application for the divorce gives the jurisdiction to the court to hear the question of alimony. The instant suit is not of that nature. By the provision of article 2972, Revised Statutes, supra, where the husband fails or refuses to support his wife from the proceeds of her separate lands, the wife may complain to the court and, upon satisfactory proof, have paid to her for her proper support so much of the proceeds as the court may deem necessary. The Act provides that the County Court shall have jurisdiction to try this proceeding. As is seen, such proceeding does not involve the removal of the husband from his powers and rights conferred by law. It still recognizes his right to continue the control and management of the wife's separate property, but does interfere with his disposition of the proceeds from the land to the extent only of compelling him to provide the wife with as much thereof as may be necessary for her proper support. It can therefore be stated as settled law that the wife may sue the husband for alimony in divorce suit, and is entitled to secure a judgment of the County Court setting aside to her proper support a sufficient portion of the proceeds from her separate lands where the husband does not furnish it, and may restrain the husband from exercising the control given him by statute over her separate lands when the husband repudiates his duties and is asserting only the rights and powers of his position for his own selfish purposes. It is to be noted that each proceeding is a distinct proceeding, and the character and object of the particular proceeding would be marked by the case plead. We do not undertake to pass on the facts of the instant case as not proper. The Dority case, we think, lays down the proper general rule to determine when the wife is entitled to a restraining order. We quote therefrom: "When there has been no abandonment by the husband of his rights and powers as such, it may be true that the wife is not, by the decisions referred to, restored to all the capacities of a feme sole merely by his misconduct; but we think that it is also true that, if the husband has repudiated the duties and is asserting only the rights and powers of his position for selfish purposes, the wife has rights of property which she can enforce in the courts, and if they can only be adequately enforced by enjoining the husband from controlling her property that this may be done." As to whether the facts of a given case are within this rule must be determined in the given case. While the husband has the right to sole management of the separate property of the wife, yet he can not abandon and repudiate his duties as husband and exercise such right to the detriment of her property rights. The authorities aptly say "that it is the duty of the husband to support the wife, and that the management of her separate property is committed to him partly for that purpose is put beyond question by the statutes and decisions. One of her rights is to have this support from him, and as far as her separate estate constitutes a fund from which the means to satisfy it are to be derived, the right is an incident to her ownership of such estate. The fruits and revenues of that estate constitute a part of such fund." If the facts alleged in the instant petition be true, and we do not prejudge,

then it appears that appellant without just cause had abandoned his marital duties, and was interfering and denying the wife adequate support, to her detriment, and was asserting only the rights and powers of a husband in demanding and receiving a part of the rent for his own selfish purposes. We conclude that the court had the power to herein determine the application for the injunction, and that he should have so done in the case. Construing the petition, as to the matter in hand, as we do, as being an application for injunction, the court should have determined and disposed of this issue made by the pleading. The decree as entered does not in terms either grant or refuse the injunction, and we think, as it is entered, has not the force or effect of either granting or denying the same. It was the application for injunction on the part of the wife that invoked the jurisdiction of the court, and it was relief by injunction that she was seeking at the hands of the court, and the relief that the court was called upon to decide and decree. In determining whether the wife was entitled to such relief as sued for, it was the duty of the court to hear all the facts necessary to properly determine the granting of the relief and the extent of the restraining order. The court wholly failed to determine the issue. The decree as entered attempted to afford relief not warranted by pleading, and in the absence of pleading without the power of the court to make. It follows that the decree as entered is fundamentally erroneous, as not having disposed of the proper issues and relief prayed for.

The decree attempts to charge the proceeds of the land with value of use or rent of the husband's community. If the divorce be granted, the right of the court to adjust the property rights exists, but if the divorce be refused, then the further power of the court to adjust the property rights ends. If the community contribute to the improvements of the separate estate, the community is entitled to reimbursement by the separate estate in the proper suit. But it is only a claim against the land and not an interest in the land, and the equity or a right is not determinable against the wife when the wife seeks to enjoin the husband from controlling her separate estate.

The judgment was ordered reversed and remanded for another trial of the case.

Reversed and remanded.

E. R. GIRARDEAU v. M. H. PERKINS ET AL.

Decided March 11, 1910.

1.—Homestead—Absolute Deed—Continued Possession—Notice.

The fact that a husband and wife continued in possession of the homestead after the execution of an absolute deed thereto, would not be notice to a purchaser from the grantee in the deed of any claim of title to the property on the part of the husband and wife inconsistent with their deed; and so of a creditor of the grantee who takes a deed of trust on the property to secure a loan.

2.—Same—Deed of Trust—Lien—Taxes.

A deed of trust by a husband and wife upon the homestead to obtain

money with which to discharge a lien and pay past due taxes on the same, is valid.

3.—Same—Improvement—Deed of Trust.

Money loaned to a husband and wife for the avowed purpose of improving the homestead can not be secured by deed of trust on the same although the money was in fact used for said purpose, unless there be at the time a contract duly executed by the wife for furnishing the materials or doing the work necessary for the improvements.

4.—Same—Cases Distinguished.

Pioneer Savings & Loan Co. v. Everheart, 18 Texas Civ. App., 192; Pioneer Savings & Loan Co. v. Paschall, 12 Texas Civ. App., 613; Bayless v. Standard Savings & Loan Co., 39 Texas Civ. App., 353, and Downard v. National Loan & Inv. Co., 22 Texas Civ. App., 570, distinguished.

5.—Same—Payments—Application—Valid and Invalid Liens.

Where a note secured by a deed of trust upon a homestead is made up of several items, some of which might legally be secured by such lien and others could not be, payments made on the note by the debtor without direction to which item or items they should be applied, will be applied first to extinguishing the items which constitute a valid lien.

6.—Trustee—Payment of Debt—Power to Sell.

A trustee has no power to sell property under a deed of trust after the debt to secure which the deed of trust was given has been paid.

7.—Same—Sale after Death of Grantor—Case Limited.

A sale of property by a trustee in a deed of trust within four years after the death of the grantor is void. The doctrine announced in Rogers v. Watson (81 Texas, 403) will not be extended so as to make valid after the lapse of four years a trustee's sale which was made within the four years.

8.—Homestead—Deed of Trust—Notice to Purchaser.

A purchaser of real property at a trustee's sale will be charged with notice that the property was occupied by the grantors in the deed of trust as their homestead at the time the deed of trust was executed, and this, though the grantors were dead and the property was not occupied as a homestead at the time of the trustee's sale.

9.—Trustee—Power—Revocation by Death.

The death of the grantor in a deed of trust revokes the power of the trustee to sell, and the purchaser at such sale is charged with notice of the fact of the grantor's death when such is the case.

10.—Homestead—Deed of Trust—Notice to Purchaser.

The very particularity with which debts, to secure which a deed of trust is given, are described as being such as might be secured by lien on a homestead might be sufficient to charge a purchaser at the trustee's sale with notice that the property was a homestead and to require investigation into the nature of the debts.

ON MOTION FOR REHEARING.

11.—Same—Innocent Purchaser.

Intimated that the rights of a purchaser at a sale under a deed of trust who pays value and who has no notice that the debt which the deed of trust was given to secure had been paid at the date of the sale, can not be affected by that fact.

12.—Same—Lien Partly Valid.

The sale of a homestead under a deed of trust to pay a debt therein named will confer no title on the purchaser when a considerable part of the debt to

secure which the lien was given, could not be made and was not a valid lien on the homestead.

Appeal from the District Court of Galveston County. Tried below before Hon. Norman G. Kittrell.

Stewarts, Geo. T. Burgess and *J. Homer Jones,* for appellant. The deed of trust given by Taylor in favor of Brown, created a valid lien because same was given to secure notes evidencing an indebtedness created for the purpose of making improvements upon the property, which lien for improvements was made and created as by law provided. Lippencott v. York, 86 Texas, 276; Bosley v. Pease, 86 Texas, 292; Pioneer Savings & Loan Co. v. Paschall, 12 Texas Civ. App., 613.

An examination of the case of Robertson v. Paul, 16 Texas, 472, and those under the same doctrine as explained by Judge Gaines, in Rogers v. Watson, 81 Texas, 400, merely shows that sale of property subject to administration, pending administration, is void because of the fact that the creditor must present his claim to the administrator appointed by the probate court. No one at all conversant with the probate or land laws of this State, would for one moment contend that sale could be made under deed of trust, pending administration. In Rogers v. Watson, it was squarely decided that sale made more than four years after the death of mortgagor, no administration having been opened on the estate, would be a valid sale. Now, it is certainly the law in this State, that where there is but one debt and one piece of property it is not necessary to open administration, and the creditor may, if he chooses, bring his suit direct in the District Court, against the heirs, for foreclosure of the lien, securing the ancestor's debt. See Telschow v. House, 10 Texas Civ. App., 671; Patterson v. Allen, 50 Texas, 23; Soloman v. Skinner, 82 Texas, 345; Buchanan v. Thompson, 4 Texas Civ. App., 236; Heard v. McKinney, 1 U. C., 88; Peters v. Hood, 2 White & Wilson, 328.

If the suit can be brought in District Court, and lien foreclosed and property sold by sheriff, why, under similar circumstances, can not a trustee make sale?

As the probate court has no jurisdiction over the homestead property of a decedent, the powers of sale contained in a deed of trust upon the homestead are not affected by the death of the maker of the trust deed. Constitution, art. xvi, section 50.

Homestead vests in heirs with or without administration, and can in no event be converted to use of creditors of estate; Griffie v. Maxey, 58 Texas, 213; Sossaman v. Powell, 21 Texas, 664.

Administrator has nothing to do with homestead: Bassett v. Messner, 30 Texas, 610.

On death homestead vests free from any control of administrators; Hanks v, Crosby, 64 Texas. 484.

Homestead is not assets in hands of administrator, subject to payment of debts; Stephenson v. Marsalis, 11 Texas Civ. App., 168; West v. West, 9 Texas Civ. App., 475.

If the property was homestead at the death of lienor, it formed

no part of estate to be administered by County Court, and the District Court had jurisdiction to foreclose the lien: Telschow v. House, 10 Texas Civ. App., 671; Williard v. Cleveland, 14 Texas Civ. App., 557.

Taylor and wife having conveyed to Perkins, who borrowed money from Wenk, secured by deed of trust executed by Perkins, the fact that Taylor continued to reside on the property, would not charge Wenk with notice of any claim to the property on the part of Taylor, but on the contrary, Taylor having conveyed to Perkins from whom Wenk took mortgage, said Wenk would be an innocent mortgagee, and the lien of the deed of trust would be valid as against Taylor, even though the transaction between Taylor and Perkins was a simulated one; and on foreclosure of such deed of trust purchaser would take title. Love v. Breedlove, 75 Texas, 649; Eylar v. Eylar, 60 Texas, 315; Hurt v. Cooper, 63 Texas, 362; Stephens v. Summerfield, 22 Texas Civ. App., 182.

Taylor having sold to Perkins, and Perkins having executed deed of trust to secure Wenk in the payment of certain notes, and said Perkins having then reconveyed to Taylor in consideration of said Taylor assuming payment of the notes held by Wenk, said notes would operate as a valid vendor's lien in the hands of Wenk, and on foreclosure purchaser would take title. Fontaine v. Nuse, 38 Texas Civ. App., 359; Murphy v. Smith, 50 S. W., 1040; Forbes v. Thomas, 51 S. W., 1097.

The undisputed evidence established defendant E. R. Girardeau to be a purchaser for value and without notice of any rights of defendants. Patty v. Middleton, 82 Texas, 586; Edwards v. Brown, 68 Texas, 329.

James B. & Charles J. Stubbs, for appellees.

REESE, ASSOCIATE JUSTICE.—M. H. Perkins and others bring this suit in trespass to try title against E. R. Girardeau to recover lot 14 in northeast block of outlot 140 in the city of Galveston. Arvester Taylor and Lola Louise Taylor, minors, were also made defendants, and answered by attorney *ad litem* joining in the allegations and prayer of plaintiff's petition. They are in effect plaintiffs.

Girardeau answered by general demurrer, general denial, plea of not guilty, and, by way of cross-action, alleged title in himself and that plaintiffs' claim of title was a cloud on his title, which he prayed to have removed.

By supplemental petition plaintiffs alleged that defendant Girardeau's claim of title rested upon a sale under a deed of trust executed by Calvin Taylor and wife to D. P. Brown to secure an alleged indebtedness of $315.61; that said indebtedness had been paid before said attempted sale; that said deed of trust was void, because the property was at the time the homestead of said Calvin Taylor and wife, and because the power to sell under the deed of trust had been revoked by the death of the makers before the sale.

The cause was tried without a jury and the court rendered judg-

ment for plaintiffs and Arvester and Lola Louise Taylor, from which defendant appeals.

From an agreement as to the facts introduced upon the trial and other evidence we find the following facts:

1. Lot 14 in northeast block of outlot 140, city and county of Galveston, Texas, was acquired by Calvin Taylor and wife, Sarah Taylor, who purchased in 1874, and was occupied by them as homestead until November 29, 1897.

2. Calvin Taylor and wife, Sarah Taylor, made and delivered to Allen G. Perkins an instrument properly acknowledged and filed for record December 3, 1897, and duly recorded, on its face appearing to be a general warranty deed, whereby said Taylor and wife conveyed unto Allen G. Perkins said lot 14 in the northeast block of outlot 140, said deed reciting a cash consideration of $1000.

3. On February 14, 1898, Allen G. Perkins and wife conveyed said lot 14 in the northeast block of outlot 140 to Wolfe W. Wenk as trustee, to secure Jacob Wenk in the payment of eighteen notes dated February 14, 1898, for $15 each, and said Jacob Wenk did lend to Allen G. Perkins the sum of $270 in money as evidenced by said notes.

4. Said Jacob Wenk died leaving a last will and testament under which Fannie Wenk duly qualified as independent executrix, and as such independent executrix said Fannie Wenk for a valuable consideration on November 25, 1898, did transfer unto Wolfe W. Wenk the hereinbefore described and mentioned notes.

5. Said Jacob Wenk at the time he loaned said money and took said notes believed that the said real property belonged to and was owned by Allen G. Perkins and had no notice of any fact, if any, to the contrary.

6. Said Wolfe W. Wenk purchased said notes before maturity and believed at that time the hereinbefore described real property was owned by Allen G. Perkins and had no notice of any facts, if any, to the contrary.

7. On February 1, 1899, Allen G. Perkins and wife by general warranty deed conveyed said real property to Sarah Taylor, the deed reciting that same was executed in consideration of $10 paid by Sarah Taylor, wife of Calvin Taylor, and for other good and valuable considerations; one of the considerations for said conveyance being the assumption by said Calvin Taylor and wife, Sarah Taylor, of the said notes held by Wolfe W. Wenk.

8. Calvin Taylor and wife were unable to pay last six of the said notes held by Wenk, aggregating $99.30, and owed $28.44 taxes on said property, and required the sum of $127.26 to make improvements on said property, and they did execute a deed of trust of date June 1, 1899, to John Charles Harris, as trustee, to secure D. P. Brown in the sum of $315.61 evidenced by notes payable monthly; said $315.61 including said amounts owing to Wenk, the sum of $28.44 taxes, and said $127.26 for improvements, and said Taylor and wife did execute, as provided in said deed of trust, and did deliver said notes and deed of trust to said D. P. Brown, and said deed of trust was duly filed and recorded, and thereupon said Brown

did, at the request of said Taylor and wife, pay over to the said Wenk the said sum of $99.30 on said notes so held by said Wolfe W. Wenk, and did pay $28.44 taxes accrued on said real property, and did advance for improvements on said property the sum of $127.26; said deed of trust and lien being executed by said Sarah Taylor and husband, Calvin Taylor, and properly acknowledged before John D. Fearhake, a notary public in and for Galveston County, Texas, and said deed of trust empowering said trustee or any substitute to sell said property.

9. D. P. Brown did pay to Wolfe W. Wenk the said sum of $99.30 and did receive from said Wolfe W. Wenk a transfer of the said notes so owing by said Taylor to said Wenk, and by said transfer said Wenk assigned and conveyed unto said Brown the said notes and all his interest in said real property. John Charles Harris, the trustee named in the before mentioned deed of trust from Taylor and wife, in writing declined to foreclose said deed of trust, and the holder of the notes thereby secured did in writing appoint W. M. Barry as substitute trustee as provided in said deed of trust, and said W. M. Barry, in accordance with the terms and as provided in said deed of trust and in accordance with the laws governing trustee's sales, did sell said real property at public auction to D. P. Brown, and did execute and deliver proper conveyance to said Brown of date May 7, 1902, the sale having been made on the first Tuesday in May, being the 6th day of May, 1902.

10. D. P. Brown in turn executed proper deed of conveyance to Wenman and Morrissey, who, by proper conveyance, conveyed to defendant herein, E. R. Girardeau, the hereinbefore described real property.

11. Calvin Taylor and wife, Sarah Taylor, were residing on said property on September 8, 1900, with their minor son, Arvester Taylor, then aged eighteen.

12. Said Calvin Taylor and wife both perished in the storm of September 8, 1900, leaving surviving them as heirs at law the following children, M. H. Perkins, aged 41 years; Edward Perkins, aged 37 years; William Perkins, aged 31 years, and Arvester Taylor, aged 18 years, at the time of his parents' death on September 8, 1900, and leaving no other children and no descendants of any deceased child or children.

13. Said Arvester Taylor died on or about July 1, 1905, intestate and leaving surviving his wife, Mary Taylor, plaintiff herein, and his two children, viz., Arvester Taylor and Lola Louise Taylor, both minors, defendants herein.

14. Said Calvin Taylor and wife, Sarah Taylor, died intestate. They owned no property other than that in controversy herein. They owed no debts other than the notes held by Brown as hereinbefore recited. No administration was opened upon the estate of either Calvin Taylor or his wife, Sarah Taylor.

15. No administration has ever been opened on the estate of Arvester Taylor, deceased, and no guardianship has been opened on the estates of the minors, Arvester Taylor and Lola Louise Taylor.

16. Calvin Taylor and wife, Sarah Taylor, resided on said prop-

erty as their homestead from the time they purchased it in 1874 until the time of their death, September 8, 1900.

17. The reasonable market value of the property in question is $2250.

Brown testified that Sarah Taylor applied to him for a loan of money to put her house in a habitable condition, for which purpose the money was used. This is not contradicted by any evidence in the record, and therefore we find that the $127 referred to in the deed of trust was used for the purpose stated. Of the fifty-six notes executed by Taylor to Brown eighteen were paid by Taylor and wife in their lifetime, aggregating not less than $115. In addition to this, $85 was paid to Brown out of money granted by the relief committee immediately after the storm, with which to rebuild on the property, aggregating $200 paid on the indebtedness of $315.61. The statement as to the amount of the eighteen notes paid may not be entirely accurate. It is arrived at from the fact that the first due of said notes was for $6.67 and we conclude from this that the others were for gradually decreasing amounts.

A sale of the property was regularly made by a substitute trustee, regularly appointed, on May 7, 1902, for the satisfaction of said indebtedness, at which sale Brown became the purchaser, receiving a deed from the trustee. Brown in turn sold and conveyed to Wenman and Morrissey, who sold and conveyed to Girardeau for $2200 cash. At the time of the sale under the deed of trust the market value of the property was about $100. Pending the suit, in 1908, there was another sale of the property, under the deed of trust executed to Brown, and also a sale under the Wenk deed of trust, at each of which sales Brown became the purchaser. Brown conveyed to Girardeau the title acquired by him under these sales.

No conclusions of fact and law were filed by the trial court, but from the face of the judgment it appears that the trial court found that the debt in so far as it embraced the $99 due on the Wenk deed of trust, had been paid, and that as to the balance of the debt, that is for taxes and for money advanced to make improvements, the property being the homestead, the deed of trust was void.

The following questions are presented by appropriate assignments of error and propositions thereunder and are decisive of the appeal, so it will serve no useful purpose to discuss the several assignments separately.

No question is made that during all of the time from 1897 to their death in 1900, Calvin and Sarah Taylor, with their minor son, Arvester Taylor, lived upon the property as their homestead. At the date of the execution of the deed of trust by Allen Perkins to Wenk the apparent title was in him under general warranty deed. The continued possession of the property by Taylor and wife was not notice to him of any claim of title on their part inconsistent with their deed to Perkins. (Love v. Breedlove, 75 Texas, 652.) So the Wenk deed of trust was not affected by the homestead claim. This being a valid lien on the property, became also, by the subsequent deed from Perkins to Sarah Taylor and the assumption by her of the payment of the Wenk debt as a part of the purchase price, a

valid vendor's lien upon the property. This valid lien on the homestead amounted at the date of the execution of the deed of trust to Brown, to $99, and formed a part of the $255, to secure the payment of which with interest thereon, this deed of trust was executed. So to this extent this deed of trust was a valid lien on the homestead. The $28.44 paid by Brown for taxes due on the property, in pursuance of the request of Taylor and wife and stated to have been so paid after the execution of the trust deed, became, when included in the deed of trust, also a valid lien on the property in favor of Brown. The taxes were a lien on the property, and when Brown paid them, at the request of Taylor and wife, and after the amount had been embraced in the deed of trust, this gave him a valid lien on the homestead to that extent.

As to the $127 of the indebtedness which was for money lent Taylor and wife to improve the property, and which was afterwards in fact used for that purpose, we think that the same was not a valid lien on the homestead, but that to that extent the deed of trust was, as found by the trial court, void. The decisions on this question are somewhat confusing, but we are of the opinion that they support the conclusion that under the provisions of section 50, article XVI, of the Constitution, a valid lien can not be created upon a homestead to secure money borrowed for the purpose of paying for improvements on the property, even when it is made to appear that it was actually used for that purpose, if there be no contract for furnishing the materials or doing the work. (Gaylord v. Loughbridge, 50 Texas, 573; Campbell v. McCampbell, 34 S. W., 970; Building & Loan Assn. v. Logan, 33 S. W., 1089; Ellerman v. Wurz (Coms. of App.), 14 S. W., 333.)

The Court of Civil Appeals of the Fifth District in Pioneer Savings & Loan Co. v. Everheart, 18 Texas Civ. App., 192 (44 S. W., 885), in a well reasoned opinion, reached a contrary conclusion; but in that case there was in fact a contract in writing to erect the improvements, although it appeared that it was understood that the loan company was not to erect the improvements, but to advance the money to Everheart with which to pay for the same, which was in fact done. The facts in Pioneer S. & L. Co. v. Paschal, 12 Texas Civ. App., 613 (34 S. W., 1001); Bayless v. Standard S. & Loan Co., 39 Texas Civ. App., 353, and Downard v. National Loan Co., 22 Texas Civ. App., 570 (55 S. W., 981), are of similar import. It is provided by the Constitution (sec. 50, art. XVI), that the homestead shall be protected from forced sale for debt except for the purchase money, the taxes due thereon," or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing with the consent of the wife," etc.; and further, "No mortgage, trust deed or other lien on the homestead shall ever be valid, except for the purchase money therefor or improvements made thereon as hereinbefore provided."

It can not by any process of reasoning be said that the debt here referred to was for work or materials used in constructing improvements on the property, and much less can it be said that such work

and materials were contracted for in writing, as provided by the Constitution. It may, in many cases, be better that the owner borrow the money so as to be able to pay cash for work and materials, as reasoned in the Everheart case, but that purpose seems not to have been embraced among those for which the homestead can be encumbered. Our conclusion is that in so far as the deed of trust executed by Taylor to Brown attempted to create a lien for the $127 borrowed for making improvements on the homestead, it was void. This left a valid lien for the $99, which was in fact purchase money, and the $28.44 taxes paid by Brown.

There does not appear to have been any application made by either Taylor or Brown of payments made, as aforesaid, aggregating about $200. The $99 due to Wenk and the $28.44 taxes paid were lumped in with the other, and the whole embraced in one note. In such case the payments made should be applied to the discharge of that part of the indebtedness which was a valid lien on the homestead (Paschall v. Pioneer Loan Co., 19 Texas Civ. App., 102 (47 S. W., 98), and by this application such part of the indebtedness was all fully paid before the first sale of the property under the deed of trust, and there was left in the trustee no power to sell. Such sale for that reason conveyed no title, and of course it follows that the subsequent sales conveyed none.

It is contended that appellant ought to be protected on the ground that he had no notice at the time of his purchase, of the fact that the property was the homestead of Taylor and wife when the deed of trust was executed, or of their death. In so far as the sale made in 1902 is concerned, that sale was made after the death of Taylor and his wife and within four years thereafter. Their death suspended the power of the trustee to sell. (Robertson v. Paul, 16 Texas, 472; McLane v. Paschal, 47 Texas, 365; Black v. Rockmore, 50 Texas, 94; Abney v. Pope, 52 Texas, 288.)

It was held in Rogers v. Watson (81 Texas, 403), that this power of sale was only suspended on account of the effect of our laws with regard to the administration of estates by the Probate Court, and that after the lapse of four years, after which no administration could be commenced, none having been opened on the estate, the power to sell could be exercised by the trustee. It is contended by appellant, with much force, that inasmuch as no administration has ever been taken out on the estates of Calvin and Sarah Taylor up to the date of the trial, eight years after their death, and no debt exists except the one to Brown, and they had no property except this homestead, the reason of the rule announced in the Rogers case applied, and the trustee was authorized to sell. If this be true, then a sale, void at the time it is made, becomes valid if administration is not taken out on the estate within four years. We do not feel inclined to extend the rule in the Rogers case so far. At any rate, if appellant's contention on this point be sustained, inasmuch as the only part of the debt which was a valid lien on the homestead had been paid, and thus the power to sell effectively divested, the only benefit to appellant would arise from the fact that at the time of his purchase in 1907 he paid full value and had no notice of the death

of Calvin Taylor and wife or of plaintiffs' claim, and presumably had no knowledge that the property was the homestead of Taylor and wife when the deed of trust was given. These are not facts of which, we think, he can be allowed to plead ignorance. Taylor and wife had lived on the property as their homestead from 1874 to their death in 1900. Any purchaser under the deed of trust given by them, even after their death and the destruction of the homestead, must take notice not only of their death, but of the homestead character of the property at the time the deed of trust was given, regardless of any want of actual knowledge of the facts. Further, it seems to us that there was enough on the very face of the deed of trust, in the particularity with which only such debts as could be supposed to support a lien on the homestead—purchase money, taxes, and cash for improvements—are embraced, to put a prudent person upon inquiry. It seems clear that inquiry pursued with the least diligence would have brought full knowledge of the facts. So we conclude that the plea of innocent purchaser must fail. The second sale under the two deeds of trust was made pending the suit, and, of course, as to the title thus obtained by appellant, the plea of innocent purchaser can not prevail.

This disposes, we think, of all the questions presented by the assignments of error and the several propositions thereunder, which are severally overruled.

We find no grounds for reversal of the judgment and it is affirmed.

ON MOTION FOR REHEARING.

Appellant in his motion for rehearing presents very forcibly the proposition that being a purchaser for value without notice that the debt of Brown, for which the sale under the deed of trust was made, was paid at the time of such sale, he should be protected as such innocent purchaser, citing Merchant v. Woods, 27 Minn., 396; Palmer v. Bates, 22 Minn., 532, and 2 Ballard on Real Property, secs. 460-1, p. 519.

We are inclined to agree with appellant upon the general proposition that the right of a purchaser at a sale under a deed of trust, who pays value and who has no notice that the debt which the deed of trust is given to secure was paid at the date of such sale, can not be affected by that fact. The application of that rule to the facts of this case, however, can not help the appellant for two reasons. First, even if the debt had been entirely unpaid the sale by the trustee in 1902 was within four years after the death of the maker of the deed of trust, and the second sale, made in 1908, was made during the pendency of this suit. But if we are mistaken in our conclusions from these facts, it appears that the sale was made for the satisfaction of the entire debt; that the property was the homestead at the date of the execution of the deed of trust, and that only a part of the debt secured was or could be made a valid lien on the homestead. We have held that the only part of the debt which was a valid lien on the homestead had been paid; but even if no

part of this debt had been paid, we are of the opinion that a sale of the property for the entire debt, a considerable part of which was not a valid lien, conferred no title on the purchaser. It has been held that a sale of the homestead for taxes due on the homestead, together with taxes due on other property, is void. (Wright v. Straub, 64 Texas, 64.) This principle applies, by analogy, to a sale of the homestead under a deed of trust for an indebtedness part only of which is a valid lien under the Constitution. The motion for rehearing is overruled.

Affirmed.

Writ of error refused.

ORANGE LUMBER COMPANY v. JOHN THOMPSON.

Decided March 11, 1910.

1.—Navigable Stream, what Constitutes.

The controlling question in determining whether a particular stream is a navigable public highway is its capacity for use as a highway rather than the extent and manner of the use. If it be capable in its natural state of being used for the purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact and becomes in law a public river or highway.

2.—Same.

If a stream is of sufficient capacity for the floating of rafts and logs in the condition in which it generally appears by nature, it will be regarded as public, notwithstanding there may be times when it becomes too low and shallow for that purpose.

3.—Same.

A stream or body of water about a mile in length, about 300 feet wide where it empties into a larger stream, six or eight feet deep for half its length, and deeper than that for its entire length during periods of high water, and used by the public for floating logs and rafts to market, is a navigable stream. There can be no private ownership in the bed of such a stream and those exclusively appropriating or obstructing the same would be liable in damages to others injured thereby.

4.—Same—Unlawfully Obstructing—Damages.

The reasonable value of the owner's time in caring for and protecting his rafts and logs while detained in a navigable stream by the unlawful obstruction of the same, is a proper item of expense and therefore recoverable against the party causing the obstruction.

5.—Appeal—Discrepancy in Briefs and Transcript.

Where there is a discrepancy between the briefs and the transcript on appeal as to the pleadings of the parties, the transcript must control although the adverse party impliedly admits that the brief is correct.

Appeal from the County Court of Orange County. Tried below before Hon. O. R. Sholars.

Adams & Huggins, for appellant.—If the location and surroundings of a stream are such that it can not reasonably be expected to become of commercial value to the public as a highway as the country

develops along its shore, it is not navigable. Jones v. Johnson, 6 Texas Civ. App., 262.

If the location of a stream is such and its length and capacity so limited that it will accommodate but a few persons, it is not navigable. 1 Farnham on Waters, 127; Haines v. Hall, 3 L. R. A., 609; Rhodes v. Otis, 73 Am. Dec., 439; Nutter v. Galagher, 24 Pac., 250; Irwin v. Brown, 12 S. W., 340; Healy v. Joliet & C. R. Co., 2 Ill. App., 435, 116 U. S., 191; Woodman v. Pitman, 1 Am. St. Rep., 342; Lewis v. Coffee County, 54 Am. Rep., 55; The Daniel Ball, 10 Wall., 557; The Montello, 20 Wall., 430; Ellis v. Carey, 30 Ala., 725; Bayzer v. McMillan Mill Co., 105 Ala., 395; Clark v. Cambridge & A. I. & I. Co., 45 Neb., 798.

A body of water is not a navigable stream, in the sense in which that term is used in law, so as to create an easement in the public of such a character as to disturb the riparian owner in the use of the same as a storage place for its logs where it has prepared said stream for the reception of its logs and used the stream for that purpose for many years, when said body of water or stream is shown to be unfit for any sort of navigation, except during high water or overflows and that its most material advantage then over the common swamp surrounding it is that the underbrush may be avoided by following the bed of the stream. 1 Farnham on Waters, 127 and note 8; Healy v. Joliet & C. R. Co., 2 Ill. App., 35, 116 U. S., 191.

If appellant wrongfully detained appellee in the transportation of his timber and it became necessary to care for and watch the timber during such delay, the measure of damages would be the reasonable expense of watching and caring for the timber, and not the value of the appellee's time consumed in watching and caring for same. International & G. N. R. Co. v. Shaughnessy, 81 S. W., 1026; Fagan v. Whitcomb, 4 Civ. App., 47; Sabine & E. T. Ry. Co. v. Joachimi, 58 Texas, 457; Gulf, C. & S. F. Ry. Co. v. Keith, 74 Texas, 287.

The court erred in failing to find that the plaintiff can not recover because he failed to exercise a reasonable effort or expend any sum to protect himself from the injurious consequences of the alleged wrongful acts of defendant. 1 Farnham on Waters, 130; Brubaker v. Paul, 32 Am. Dec., 111; Selman v. Wolfe, 27 Texas, 68; Houston & T. C. Ry. Co. v. Mitchell, 38 Texas, 95; Brandon v. Gulf City Mfg. Co., 51 Texas, 128; Womack v. Western U. Tel. Co., 58 Texas, 182; Texas & St. Louis R. Co. v. Young, 60 Texas, 202; Houston, E. & W. T. Ry. Co. v. Adams, 63 Texas, 209; Barclay v. Scott, 1 App. Civ., par. 112; O'Nill v. Davis, 1 App. Civ., par. 417; Stoker v. Wilson, 3 App. Civ., 10; Missouri Pac. Ry. Co. v. Rushin, 3 App. Civ., par. 318; Cooper v. City of Dallas, 83 Texas, 242; Austin & N. W. Ry. Co. v. Anderson, 85 Texas, 90; Pullman Palace Co. v. McDonald, 2 Texas Civ. App., 325; Gulf, C. & S. F. Ry. Co. v. Simonton, 2 Texas Civ. App., 561; Arundel v. McCulloch, 10 Mass., 70.

George E. Holland and *V. H. Stark,* for appellee.—Those streams which are susceptible of being used in their ordinary condition as highways of commerce, in whatever form the commerce may be con-

ducted, are navigable waters. The Daniel Ball, 10 Wall., 557; The Montello, 20 Wall., 432; 21 Am. & Eng. Ency. Law, 2d ed., 428; Jones v. Johnson, 6 Texas Civ. App., 262; Gould on Waters, 3d ed., sec. 109, p. 204.

The capability of use by the public for the purposes of transportation affords the true criterion of navigability of a river, rather than the extent and manner of its use. Same authorities.

The public has the equal use to all parts of a navigable stream, and no person has a right to place a permanent obstruction in a navigable water thereby appropriating any portion of such water to his own use to the exclusion of the public generally. Gould on Waters, 3d ed., sec. 108, p. 204; Brown v. Chadbourne, 31 Me., 9; Parks v. Morse, 52 Me., 260.

If plaintiff was compelled by the wrongful acts of defendant to devote his time to caring for his logs, then the value of his time is a part of the reasonable and actual expense incurred, and is recoverable. Orange Lumber Co. v. Thompson, 113 S. W., 564.

No man is ever required to use illegal force to protect himself against the wrongful acts of another and it is no defense in a suit for damages for the doing of a wrongful act that the other party did not use force to prevent it. Gould on Waters, sec. 92, p. 178, 3d ed.; Cummins v. Presley, 4 Harr. (Del.), 315; Foster v. Holly, 38 Ala., 76; Castello v. Landwehr, 28 Wis., 522.

Under the undisputed evidence in this case the trial court should have rendered judgment in plaintiff's favor for $450, the proven market value of thirty-six sticks of cypress timber lost in the mouth of Old River, and fourteen sticks in the mouth of Tiger Bayou. Gulf, C. & S. F. Ry. Co. v. Greenlee, 62 Texas, 351; Sabine & E. T. Ry. Co. v. Joachimi, 58 Texas, 460; Waco Tap Ry. Co. v. Shirley, 45 Texas, 375.

A permanent obstruction placed in a navigable water is an unreasonable use of such water and can not be maintained for any length of time. Gould on Waters, 3d ed., sec. 134, and note; Tennessee & C. R. R. Co. v. Danforth, 112 Ala., 80; Mills v. Hall, 9 Wend., 315; Morton v. Moore, 15 Gray, 573.

PLEASANTS, CHIEF JUSTICE.—This is a suit to recover damages brought by appellee against the appellant. Omitting the formal parts, the petition is as follows:

"That heretofore, to wit, on or about the 29th day of April, 1905, plaintiff owned and had in his possession sixty-five sticks of cypress timber which he had theretofore cut down and topped and placed in Tiger Bayou and Old River, both of which are navigable streams in Orange County, Texas, for the purpose of floating the same down and upon the waters of the Sabine River, a navigable stream, to Orange, his only market.

"That on or about said date, and for a long time thereafter, defendant constructed and maintained a boom, and kept the same constantly filled with floating timber and logs in and across the mouths of said Old River and said Tiger Bayou and extending a distance of some three miles up and down the said Sabine River above and

below the mouths of the said Tiger Bayou and Old River, in such manner that said Orange Lumber Company's logs completely blocked Tiger Bayou and Old River for a distance up from their mouths, and kept the Sabine River blocked and filled with logs for a distance between the west bank of said Sabine River and said boom, although often requested by plaintiff to open same or to allow said plaintiff to open same, refused to do so or to allow plaintiff to do so, and prevented plaintiff from reaching and shut plaintiff off from his only market for his said cypress timber.

"That but for the said acts of defendant, plaintiff could and would have brought all of his said timber to market and could and would have sold the same; but that said acts of defendant kept and prevented plaintiff from marketing his said timber, and resulted in the total loss, by sinkage and otherwise, of thirty-six sticks of said timber, which plaintiff here alleges were of the reasonable value of $430, to plaintiff's damage in the sum of $430.

"That said acts of defendant caused and necessitated plaintiff in order to look after and take care of said timber, in order to prevent its loss and to get through defendant's boom and logs and to his market, and plaintiff did for 150 days, to wit, from April 20, 1905, to October 1, 1905, camp near and spend his entire time for said period in trying to save said timber and prevent its loss and to get through the boom and logs and to his market, and that said plaintiff's time and labor for said period of 150 days was reasonably worth the sum of $3 per day or $450, to plaintiff's damage in the sum of $450.

"That after said time, to wit, some time in April or May, 1906, defendants opened up said boom and took out their logs, permitting plaintiff to get out what part of his timber was not lost and sunken, but that plaintiff could only find and get out twenty-nine sticks of his original sixty-five sticks, and that while if plaintiff had been permitted on said 29th day of April, 1905, and for a reasonable time thereafter, to pass through defendant's timber and boom, said timber would have easily floated down to market; that said delay caused the same to sink and to stick in the mud, and caused and necessitated an additional expense to plaintiff in raising and floating said twenty-nine sticks, of the value of $20, to plaintiff's damage in the sum of $20."

The prayer is for the recovery of the damages alleged.

Defendant answered by a general and a special exception and general denial, and by special plea setting up that it is the owner of the boom described in the petition and the lands on said Sabine River, where said boom is located, and that said boom in no way impedes the navigation of said river.

The trial in the court below without a jury resulted in a judgment in favor of plaintiff for the sum of $711. This amount, as shown by the conclusions of fact filed by the trial judge, is made up of the following items: $324, value of timber lost in Old River, and $387, value of plaintiff's time and services in the necessary care of his logs while he was prevented from floating them to market by

the wrongful act of the defendant in obstructing the passage of Old River and Tiger Bayou, as alleged in the petition.

The first assignment of error complains of the refusal of the trial court to sustain defendant's special exception to the petition on the ground of ambiguity, in that it is uncertain whether the petition charges an obstruction in the Sabine River and consequent damages therefrom, or the obstruction of Old River and Tiger Bayou and consequent damage to plaintiff by reason of such obstruction.

There is no merit in the assignment. There is no ambiguity or uncertainty in the petition as to the facts alleged in regard to the obstruction of the streams named. The only obstruction of Sabine River alleged is that caused by the boom across the mouth of Tiger Bayou and Old River, and the only complaint as to this obstruction is because it prevented plaintiff from floating his logs out of said Bayou and Old River. There is nothing in the petition susceptible of the construction that any claim for damages is asserted on the ground that the boom obstructed the navigation of Sabine River beyond the impediment which it caused to access to the channel of said river from the other streams named, and if plaintiff had a right to the use of said streams, he had the right to get out of them and into the channel of Sabine River, and any obstruction in said river which prevented this was unlawful, regardless of whether it was an obstruction of the navigable channel of the river.

It is next contended under appropriate assignments of error, which it is unnecessary to set out or discuss in detail, that the trial court erred in holding that Old River was a navigable stream, and therefore erred in holding that appellant was guilty of any wrong in obstructing its use as such by the appellee.

We can not agree with appellant in this contention. Old River is about a mile in length and Tiger Bayou is two or three miles long. The former at its mouth and for a half mile above is 300 feet wide, and from six to eight feet in depth, at all seasons of the year. Tiger Bayou is fifty feet wide at its mouth. The testimony as to the capacity and use of these streams for navigation purposes is as follows:

Plaintiff testified: "They are streams of water from six to eight feet deep and in some places 300 feet wide. They enter into the Sabine River about five miles from Orange. Old River is from six to eight feet deep clear up to the ditch, which is about a half mile. Above that during the high water I could not reach bottom at all with a fourteen foot pole, but it was high water when I got my timber out. Old River is about one mile long from the mouth to the head, but after it gets above the ditch it is not so wide. Above the ditch I don't know how deep it would be at low water, but when I got my timber that was not a big rise. In high water I can't touch the bottom with a fourteen foot pole. Tiger Bayou runs into the Sabine River about one and a half miles above Old River. It is not over about fifty feet wide at its mouth. It is a good deal longer than Old River. It might be two or three miles long. During high water its average depth was, I think, ten or twelve feet. When at its mouth it is closer to Old River than at its source. Those streams are capable of floating logs. They are used for that pur-

pose. It is the only way to get timber out of where I got it. Timber had been run out of the float roads for probably thirty or forty years. They had been used for that purpose for the last thirty or forty years, probably longer than that. They are capable of floating timber just what time the high water lasts. Sometimes it is four or five weeks. Thousands of trees have been gotten out up there during these years. A good many men have been getting timber out that way during these years."

The witness Bancroft testified: "I have been familiar with those streams during the time I have been here. They have been used principally for the purpose of getting cypress timber out and floating it. They are capable of floating cypress timber during the cypress season, as it is called. There has been a vast quantity of cypress timber gotten out that way. It has been continuous during the time since I have been here for the last twenty or more years up to ten years ago. Numbers of people have been engaged in that business during the time I have known it. They would float the timber down those streams in the Sabine River and on to Orange after it was gotten out of the woods. I have bought thousands of logs from up there during the time I have been here. I bought them up to, I think, about 1898. Since that time I have been out of the cypress business."

The witness Smith testified: "I am acquainted with Old River and Tiger Bayou and the country surrounding them. I have gotten out cypress timber all over that swamp all the way from 1892 on up. I have gotten a pretty good amount of cypress timber out of there. We have operated in there about twenty-three years. Old River and Tiger Bayou are capable of floating cypress logs into the Sabine River. They have been used for that purpose during all the time I have known them. I came to Orange in '71. I never floated out timber until about two years afterwards. I have continuously floated it since that time. It is still capable of floating logs. Those two streams have been used by people in that neighborhood for bringing out cypress timber during the last twenty years."

The question of what is a navigable stream in which the public have a right of easement has been often before the courts and the decisions on the subject are not entirely harmonious. It is well settled, however, that the common law rule which limits navigable streams to those in which tide ebbs and flows does not obtain in the United States, and the controlling question in determining whether a particular stream is a navigable public highway is its capacity for such use. In the Montello case (20 Wall., 432), it is said by the Supreme Court of the United States that the capability of use by the public for purposes of transportation affords the true criterion of the navigability of a river rather than the extent and manner of that use. If it be capable in its natural state of being used for the purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact and becomes in law a public river or highway.

Mr. Cooley in discussing this question says: "If a stream is of sufficient capacity for the floating of rafts and logs in the condition

in which it generally appears by nature, it will be regarded as public, notwithstanding there may be times when it becomes too dry and shallow for that purpose."

In the case of Lewis v. Coffee County, 77 Ala., 190, the court says: "It may be conceded that a stream of sufficient depth and width in its natural state to be used for the transportation of timber or logs, though it may not be technically navigable, is subject to the public right of user. We do not understand that to constitute a navigable stream, it is requisite there shall be sufficient water for the common use of trade and commerce during all seasons of the year. It must, however, as the result of natural causes, be capable of valuable floatage periodically during the year and so continue long enough at each period to make it susceptible of beneficial use to the public."

In Gould on Waters, section 109, it is said: "In this country, where this question is more important than in England, notwithstanding the conflict respecting the title to large fresh water rivers, the authorities agree that streams which in their natural condition are only useful for rafting purposes during the whole or a part of each year, are highways for that purpose, and that the title of the riparian owners to the beds of such streams is subject to this right of passage."

Under the rules announced in these authorities the testimony before set out is sufficient to sustain the finding that both Old River and Tiger Bayou are navigable streams. It follows that appellant's obstruction of the use of said streams by appellee as a public highway was wrongful and rendered appellant liable for any damage sustained by appellee which was a proximate result of such obstruction.

Appellant does not, and can not under the laws of this State, claim any private ownership or right in the bed of said streams. Our statute declares that a navigable stream is one thirty feet in width, and in the survey of public lands for patent the lines of the survey shall not cross such streams. (Art. 4147, Sayles' Civil Statutes.) While the designation of streams thirty feet wide as navigable streams in the purview of this statute does not of itself make such streams navigable public highways, the fact that the bed of the streams can not become private property would, we think, give the public or any portion thereof a right to their use as navigable public highways whenever they have sufficient water for such purposes, even if the evidence as to their capability as navigable public highways might not be sufficient to impose an easement of this kind over private property. City of Austin v. Hall, 93 Texas, 591.

There is no merit in the contention that the court erred in allowing plaintiff to recover the value of his time lost in caring for his logs during the time they were kept in Old River and Tiger Bayou by reason of the wrongful obstruction of said streams by the defendant. It is true that upon this claim for damages the correct measure of damage was the reasonable expense of protecting and caring for the timber during the time it was unlawfully detained. Appellee testified that in order to protect his timber he had to stay near it at all times and that the value of his time consumed in watching and caring for his logs was $3 per day. It being necessary to so guard the timber, the value of appellee's time in guarding

it should be regarded as a part of the reasonable expense incurred in caring for and protecting it. Orange Lumber Co. v. Thompson, 113 S. W., 563.

It would serve no useful purpose to discuss appellant's various assignments of error in detail. All of them have been duly considered and none, in our opinion, should be sustained.

Appellee by cross-assignments complains of the judgment of the trial court in that it does not allow him damages for the value of the full time lost by him in watching his logs while their transportation was wrongfully obstructed by appellant. We think this complaint is just. The trial court deducted twenty-one days from the time so lost by appellee, on the theory that appellant had the right to obstruct said stream for a reasonable time, and that under the circumstances shown by the evidence twenty-one days was a reasonable time to permit appellant to continue such obstruction. This conclusion is not sound. If the obstruction of the streams was caused by the reasonable use thereof by appellant for purposes of navigation, its right to use the streams for that purpose being equal to that of appellee, the latter could not complain of the obstruction caused by such use by appellant. But this was not the cause of the obstruction of the streams. They were not being used as a public highway by appellant for the transportation of its timber, but as a storage place, and when a right of way was demanded by appellee it was appellant's duty to grant such request forthwith, or at least without unnecessary delay; and counsel for appellant admit in their brief that the boom could have been opened and appellee given access to Sabine River in an hour after such demand was made.

Appellee also complains, under an appropriate cross-assignment, that the court erred in refusing, on the ground that Tiger Bayou is not a navigable stream, to allow him to recover the value of the fourteen logs lost by him in said stream. From what we have before said it follows that the trial court erred in holding that Tiger Bayou is not a navigable stream and in refusing on that ground to give appellee judgment for said fourteen logs. But the judgment in this respect can not be changed because appellee's petition does not ask for recovery of the value of said logs. As shown by the petition before set out, appellee only claims to have lost thirty-six logs and the court gave him judgment for the value of that number of logs.

The evidence shows that appellee had 152 logs in these streams when the use of the streams was obstructed by appellant, and that because of such obstruction he lost by sinking thirty-six logs in Old River and fourteen in Tiger Bayou. The case was argued orally before this court and appellee's cross-assignment under which he insists that the judgment of the court below should be rendered in his favor for the value of said fourteen logs was not met by appellant with the statement that the petition did not authorize such recovery. The petition as copied in appellee's brief alleges the loss of the fourteen logs in Tiger Bayou. Under these circumstances in our judgment rendered in this case on February 24, we reversed this finding of the trial court and rendered judgment for appellee for the value of the fourteen logs lost in Tiger Bayou in addition to the

thirty-six lost in Old River. That judgment will be set aside upon our own motion, there being no pleading to support a judgment for the fourteen logs so lost. We are at a loss to understand how this matter could have been overlooked by the trial judge and the counsel for appellant, and why it is that the petition copied in appellee's brief contains a material allegation entirely wanting in the petition appearing in the record.

From what we have said it follows that the judgment of the court below should be reversed upon appellee's cross-assignments, and judgment here rendered in his favor for the value of the thirty-six logs lost by him and for the value of the full time consumed by him in caring for his logs while they were held by the obstruction of the streams by appellant, and it has been so ordered.

Reversed and rendered.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS v. MCINTOSH & CARLISLE.

Decided March 11, 1910.

1.—Railway—Fire—Evidence—Common Knowledge.

Since locomotive engines often burn oil instead of wood or coal, it can not now be taken as a matter of common knowledge, if it ever was, that all such engines emit sparks capable of setting fire to adjoining buildings, nor to what distance dangerous sparks can be carried from them.

2.—Same.

In the absence of proof that a locomotive passing a house sixty-five or seventy feet from the track half an hour or more before fire was discovered therein emitted sparks in its operation, or of the character of fuel used in the engine, its mere passage and the subsequent discovery of the fire were insufficient to support an inference that such fire was communicated from the engine.

3.—Inferential Proof.

It is not permissible to base one inference upon another.

Appeal from the District Court of Upshur County. Tried below before Hon. R. W. Simpson.

E. B. Perkins, Marsh & McIlwaine and *J. S. McIlwaine,* for appellant.—The facts proven were insufficient upon which to base a presumption that the fire was set out by defendant's engine. International & G. N. Ry. Co. v. Timmerman, 61 Texas, 660; Gulf, C. & S. F. Ry. Co. v. Meentzen Bros., 52 Texas Civ. App., 416; Sheldon v. Hudson River Ry. Co., 67 Am. Dec., 155.

Maberry & Maberry and *Warren & Briggs,* for appellee.—It is sufficient if all the facts and circumstances in evidence fairly warrant the conclusion that the fire did not originate from some other cause. Gulf, C. & S. F. Ry. Co. v. Blakeney, 48 Texas Civ. App., 443; St. Louis, I. M. & S. Ry. Co. v. Coombs, 88 S. W., 595; St. Louis, I. M. & S. Ry. Co. v. Dawson, 92 S. W., 27; Monte Ne Ry. Co. v. Phillips, 96 S. W., 1060.

WILLSON, CHIEF JUSTICE.—The appeal is from a judgment in favor of appellees, plaintiffs below, against appellant for the sum of $1425, as the damages suffered by the former as the result, as alleged, of the destruction by fire negligently set by the latter, of a stock of general merchandise and of a building in which same were situated.

The only question made by the assignments is one as to the sufficiency of the evidence to support the verdict and judgment.

Appellees were merchants and owned a wooden building ten or twelve years old, having a gable-shaped roof covered with shingles, and fronting southeast towards appellant's line of railway in the town of Pritchett. The building was on the slant of a hill, and the front part of it was elevated to a height of about three feet above the ground. It was within sixty-five or seventy feet of the center of the track of appellant's line of railway. The postoffice was kept in the building, and appellees had in it a stock of general merchandise. Between 12 and 1 o'clock on Sunday night, May 31, 1908, the roof of the building near the comb thereof and near cleats or teeboards left thereon in shingling it, was discovered to be burning, and before the fire could be controlled it destroyed the building, its contents, and several other buildings near to it. From a point south on its line of railway to a point north thereon about opposite said building, appellant's line of railway was "up grade." About one-half or three-quarters of an hour before the building was discovered to be on fire, one of appellant's trains going north passed along the track in front of said building. The locomotive pulling the train was moving slowly and exhausting steam. At the time when the building was discovered to be afire, the wind was blowing gently from the southeast, that is, from across the railroad track and towards said building. The building had a front and a back door. The front door was closed when citizens of the town, in response to an alarm given, reached the scene of the fire. Whether the back door was then open or closed was not shown by the testimony. There were two keys to the doors of the building. The postmaster, L. L. Johnson, carried one of them. The other at times was carried by one or the other of the appellees, and at other times by their clerk, Alex Maberry, or by appellee McIntosh's son, Delbert. Appellee McIntosh during several days before the fire occurred had been sick and had not been in or about the building. Appellee Carlisle and his clerk, Maberry, had not been in it since the Saturday night before it burned on Sunday night. Delbert McIntosh was in the building at an hour not shown by the testimony on the Sunday afternoon before the fire occurred, and so far as the testimony shows to the contrary he was the person last in it before it was destroyed. Carlisle testified that there was a stove in the storeroom, but that there was not on the Saturday night before the fire, and had not been for some time previous thereto, any fire in it. Delbert McIntosh did not state whether there was any fire in the stove when he was in the building on said Sunday afternoon or not. Johnson, the postmaster, did not testify on the trial, and it was not shown when he was last in the building. It was shown that shotgun cartridges formed a part of the stock of goods. Appellant's witness West testi-

fied that at the time the fire occurred he lived in a house situated about seventy-five yards from the building in question and nearly opposite to and across the railroad from it; that he was aroused from sleep on the night the fire occurred by a noise he at the time thought was made by a "horse kicking a stable," but which he afterwards concluded was made by the explosion of shells; that he looked from a window in the room where he was sleeping, and saw what he at the time supposed to be cinders left by a locomotive burning on the railroad track, but which he soon afterwards discovered to be fire burning "back up under plaintiffs' store." The witness testified that he at once gave an alarm and went to the burning building, and thought he was the first person to get to the fire. He further testified that when he first saw the fire under the house there was no fire on the roof of the building. West's testimony was corroborated by that of his daughter, who also testified that she saw fire up under the building.

There was no evidence showing that locomotive engines in generating steam emitted sparks of fire, nor, if they did, that sparks emitted by them were ever carried by the wind a distance of sixty-five or seventy feet. Therefore, unless it should be said that it was a matter of such common knowledge as to dispense with proof thereof, that such engines did emit such sparks and that same were sometimes carried such a distance, appellant's contention that the evidence was not sufficient to support the verdict and judgment must be sustained. In Sheldon v. Hudson River R. R. Co., 14 N. Y., 218, 67 Am. Dec., 159, it was expressly held that "the jury can not take judicial cognizance of the fact that locomotive engines do emit sparks and cinders which may be borne a given distance by the wind." The rule so announced, we think, is a reasonable and safe one; especially so, in view of the fact that oil now is sometimes used as a fuel to generate steam in such engines, and in view of the further fact that it can not be said to be a matter of common knowledge, if true at all, that engines in exhausting steam made by oil as a fuel emit sparks of fire. Had it been shown that the locomotive referred to by the witnesses was an oil-burning one, certainly it could not be said that the jury, in the absence of evidence showing that oil-burning engines sometimes emitted sparks of fire which were carried such a distance, might have found that the building was set on fire by sparks from such locomotive. Yet, for aught appearing to the contrary in the record, the locomotive in question may have been burning oil on the occasion when it pulled the train by appellees' building.

The conclusion reached by us is not in conflict with Gulf, C. & S. F. Ry. Co. v. Blakeney-Stevens-Jackson Co., 106 S. W., 1142, cited by appellees. In that case it was shown that the locomotive burned coal, and within a few weeks before the time of the fire had been seen to emit sparks of fire which had been carried by the wind a greater distance than the distance they needed on the occasion then in question to have been carried to set the fire complained of. St. Louis, I. M. & S. Ry. Co. v. Coombs, 88 S. W., 595; St. Louis, I. M. & S. Ry. Co. v. Dawson, 92 S. W., 27, and Monte Ne Ry. Co. v. Phillips, 96 S. W., 1060, also cited by appellees, and other cases

decided by the Supreme Court of Arkansas, not cited by them, seem to sustain their contention that evidence showing property to have been discovered to be on fire within a short time after a locomotive passed near it, and indicating no other source from which it might have been communicated, is sufficient to support a finding that the fire was communicated to the property by sparks from the engine. We do not agree that the rule as recognized by that court is a sound one. If it could have been said a few years since, when wood and coal exclusively were used as a fuel in generating steam in locomotive engines, that it was a matter of common knowledge that all locomotives emitted sparks of fire in generating steam, we very much doubt if it ever properly could have been said that it was a matter of common knowledge that such sparks when so emitted ever were carried by the wind alive a given distance (7 Enc. Ev., p. 892; Harper Furniture Co. v. Express Co., 57 S. E., 458; Chicago, St. L. & P. Ry. Co. v. Champion, 32 N. E., 874); and we are sure it should not be said now that steam in locomotives not infrequently is generated by the use of oil as a fuel, that it is a matter of common knowledge that all locomotive engines now in use emit sparks of fire, and that sparks, if emitted by them, are ever carried by the wind alive a given distance. Therefore, we think the ruling of the Arkansas court can not be justified on the ground that jurors should be held to judicially know such matters. The ruling of that court must, therefore, we think, be justified, if it can be, upon the ground that it was permissible for the jury to infer as a fact that the fire was communicated by the locomotive, from the circumstances that there was fire in the locomotive, that the property was discovered afire shortly after the locomotive passed near to it, and the absence of any other obvious source from which the fire could have been communicated to the property. But to infer such a fact from such circumstances involves, it seems to us, a violation of the well established rule that forbids the making of one inference or presumption the basis for another one. To find as a fact from the circumstances recited that the fire was communicated to the property by the locomotive the jury must have inferred that a spark was emitted from the locomotive; that the spark so emitted was carried to the property; that the spark was alive when it reached the property; and finally, that it set the property on fire. The inference that a spark was emitted from the locomotive might be referred to proof that there was fire in the locomotive; but the other inferences in the chain may not be referred to any of the circumstances proved, but necessarily must be referred to the inference that the spark escaped from the locomotive. Such is not the process by which the ultimate fact that fire was communicated to the property by a locomotive is found, when it is shown, directly or circumstantially, that the engine emitted sparks, that sparks so emitted sometimes were carried alive a given distance, and after being carried such a distance sometimes set on fire inflammable substances. With such evidence before them the jury could infer from the fact that the engine had been known to emit sparks, that it emitted them on the occasion in question; from the fact that sparks so emitted were sometimes carried alive a given

distance, that they were carried such a distance on such occasion; and from the fact that after being carried alive such a distance they sometimes set on fire inflammable substances, that they did so on the occasion in question.

Because the evidence was insufficient to support it, the judgment is reversed and the cause is remanded for a new trial.

Reversed and remanded.

WOODMEN OF THE WORLD v. LULA MCCOSLIN ET AL.

Decided March 12, 1910.

1.—Contract of Insurance—Death in Personal Difficulty—Charge.

In a suit upon a contract of life insurance, the defense being that the insured violated the contract of insurance by making an unlawful assault with a pistol upon a third party whereby a duel resulted and the insured was killed, charge considered and held, when considered and construed as a whole, not subject to the objections that it ignored said defense; nor that it assumed, without warrant in the evidence, that the third party was the aggressor; nor that it submitted an issue (that of apparent as distinguished from actual danger) not raised by the evidence.

2.—Charge—Burden of Proof.

A mere instruction to the jury that certain issues were to be determined by a preponderance of the evidence is not equivalent to an instruction as to the burden of proof, and in the absence of such an instruction when the evidence is conflicting upon a material issue a litigant has the right to request and it is the duty of the court to give a charge placing upon the proper party the burden of proof.

3.—Contract of Insurance—Death in Personal Difficulty.

The insured in a policy of life insurance has the right to act in self-defense under a reasonable apprehension of danger from an assault by a third party, and by so doing he will not forfeit his rights under such policy containing a stipulation that the policy would be void in the event the insured should die in consquence of a duel or of the violation or attempted violation of the laws of the State.

Appeal from the District Court of Limestone County. Tried below before Hon. H. B. Daviss.

Harper, Jackson & Harper and *Sleeper, Boynton & Kendall,* for appellant.

Walter Angus Keeling and *Williams & Bradley,* for appellees.

BOOKHOUT, ASSOCIATE JUSTICE.—This is a suit brought by appellees against appellant, on a beneficiary certificate for $1,000, issued by appellant, to one J. T. McCoslin, a member of the Woodmen of the World, on the 21st of March, 1905; and also for the sum of $100, provided for in said certificate as a fund to erect a monument over the grave of the member. The certificate was payable upon the death of said J. T. McCoslin to Lula McCoslin, his wife, and children. three-fourths, and to J. H. McCoslin and A. T. Martin one-fourth.

The plaintiffs in the suit are Lula McCoslin and her children and J. H. McCoslin and A. T. Martin. The plaintiffs' petition sets out the death of J. T. McCoslin on September 2, 1907, and due notice thereof to the defendant and refusal of defendant to pay.

The defendant pleaded a general denial, and, specially, that said certificate provided that in the event the said J. T. McCoslin should die in consequence of a duel, or of the violation or attempted violation of the laws of the State, the same should be void and of no effect; and that on or about the 27th day of August, 1907, said J. T. McCoslin, in violation of the laws of the State of Texas, made an unlawful assault with a pistol on one Dr. J. H. Keys, and that a number of shots were exchanged between them, during which the said J. T. McCoslin was struck and wounded with a bullet, in consequence of which he died, and thereby said certificate had become null and void.

There was a trial of the case before a jury, which resulted in a verdict for plaintiffs, on which judgment was rendered in accordance with the prayer of the petition. Defendant made a motion for a new trial, which was overruled, to which exception was taken and notice of appeal given, appeal bond filed and errors assigned, and the case is brought to this court for revision.

In its first assignment appellant complains that the court erred in charging the jury as follows: "You are instructed that if you believe, from a preponderance of the evidence in this case, that the Sovereign Camp of the Woodmen of the World issued and delivered to J. T. McCoslin, the certain beneficiary certificate and policy of insurance offered in evidence upon this trial before you, and that said J. T. McCoslin complied with all the conditions and requirements thereof, and paid all premiums due thereon during his life, and to the date of his death, and that more than two years had elapsed since the date of said policy, and that said J. T. McCoslin is now dead, then you will find for plaintiffs in the sum of $1,000, together with six percent interest thereon from the date of proof of death of J. T. McCoslin, to wit, November 30, 1907; and that you will find for plaintiff the further sum of $100, the contract price of the tombstone contracted to be placed at the grave of deceased. This judgment you will apportion between the plaintiffs as follows: three-fourths to Lula McCoslin and her five children, Thomas, Horace, Lillian, George and Barney McCoslin, and one-fourth to J. H. McCoslin and A. T. Martin."

It is contended that this charge, in effect, ignored the defense which was set up in defendant's answer, the phrase in said charge requiring the jury to find that said J. T. McCoslin complied with all the conditions and requirements of said beneficiary certificate not being a sufficient reference to such defense to call the attention of the jury thereto, especially in view of the fact that the court did not undertake in his charge to the jury to state, define or construe the conditions and requirements of said beneficiary certificate, or make any other reference thereto. This contention is not sustained. The portion of the charge complained of instructed the jury what facts must be found by them before they could find for plaintiffs, and was followed in the next paragraph with instructions as to the matters that must be found by them to authorize a verdict for defendant.

This paragraph reads as follows: "You are further instructed that if you believe from a preponderance of the evidence in this case that J. T. McCoslin unlawfully and without justification, and in violation of the law of the State of Texas, made an assault to murder on Dr. J. H. Keys, and that in the course of said difficulty said Keys shot said McCoslin while he was so violating the law, and that said McCoslin afterwards died from said wounds so received, then you will find for defendant." It was not necessary that the statement of the affirmative matter should also contain a statement of the defensive matter. The charge is to be construed as a whole, and, when so construed, the jury could not be misled by the charge complained of.

Error is assigned to that portion of the charge reading as follows: "And you are further instructed that, unless you find that said J. T. McCoslin acted in violation of law in making the assault on Dr. J. H. Keys, if you find he made any such assault; or if you believe from the evidence in the case that said McCoslin was acting in his necessary self-defense—that is, the necessary defense of his person against what appeared to him to be an unlawful assault by Dr. Keys upon his person—then you are instructed that if he died from a wound received in a difficulty, this does not preclude the recovery as hereinbefore instructed, and if you so find you will find for the plaintiffs as hereinbefore instructed."

The proposition presented is that this portion of the charge assumes that Dr. Keys had done some act from which it might appear to J. T. McCoslin that said Dr. Keys was making an unlawful assault upon his person, whereas the overwhelming preponderance of the testimony shows that the said Keys, prior to the time when he was fired upon by the said J. T. McCoslin, had done no act from which it would appear that said Keys was then making an unlawful assault upon the person of the said J. T. McCoslin. The charge is not subject to the construction given it by appellant. It does not assume "that Dr. Keys had done some act from which it might appear to J. T. McCoslin that Dr. Keys was making an unlawful assault upon his person." The charge instructs the jury that, "unless you find that said J. T. McCoslin acted in violation of law in making the assault on Dr. Keys," etc., or if "McCoslin was acting in his necessary self-defense," etc., such finding would not preclude a recovery by plaintiffs. Deceased, J. T. McCoslin, had heard, about two weeks before being shot, that Dr. Keys had threatened his life. John McCoslin, who was in the wagon with his father at the time of the shooting, testified that "just about the time we got up even with him (Dr. Keys) he reached down in front of the buggy and picked up his gun. Father (deceased) saw him about that time and grabbed his gun, and both of them began to shoot. It was hard to tell which one got the first shot. I called my father's attention to the fact that Dr. Keys was about to shoot him." This evidence, if true, was sufficient to sustain a finding that Dr. Keys was the aggressor in the fight.

Again, it is contended that, under the evidence of the plaintiffs, the danger to J. T. McCoslin, if any, was actual, and not apparent in the sense of being imaginary danger to said J. T. McCoslin, as a justification of his assault on Dr. Keys, and the court should not have in-

structed the jury on "defense of his person against what appeared to him to be an unlawful assault by Dr. Keys upon his person." This contention is not sustained. If there was actual danger to J. T. McCoslin, it necessarily follows that there was apparent danger to him. Under plaintiffs' testimony, the actual danger was preceded by such appearances of danger as to call upon deceased to defend "against what appeared to him to be an unlawful assault by Dr. Keys upon his person."

Error is assigned to the court's action in giving to the jury special charge No. 1 requested by the plaintiffs, as follows: "At the request of plaintiff, you are charged that the burden of proof is upon the defendant to show by a preponderance of the evidence that the deceased, J. T. McCoslin, met his death in violation of or attempted violation of the law, and unless you believe such fact is shown by such preponderance of all the evidence in the case you will find for the plaintiff."

It is contended that this charge "gave undue prominence to the necessity on the part of the defendant to show, by preponderance of the evidence, that J. T. McCoslin met his death in violation or an attempted violation of the law, for the reason that the court in his main charge had already told the jury that, in order to find for defendant, they must believe from the preponderance of the evidence that the said McCoslin without justification, and in violation of the laws of the State of Texas, made an assault to murder Dr. J. H. Keys, and in the course of the difficulty was shot, and afterwards died from the wound, in order to find for defendant. And the court had also instructed the jury that, unless they found that said J. T. McCoslin acted in violation of the law in making the assault on Dr. J. H. Keys, or if they believed that he was acting in self-defense, to find for plaintiffs." The main charge had nowhere instructed the jury, except by inference, upon whom the burden of proof rested, and this charge was asked to correct this omission in the court's charge. The court had instructed the jury that certain issues must be determined by a preponderance of evidence, but it is held that this does not place the burden of proof. Kerr v. Blair, 47 Texas Civ. App., 406 (105 S. W., 552); El Paso Electric Ry. Co. v. Alderete, 36 Texas Civ. App., 142 (81 S. W., 1248); W. of W. v. Torrence, 103 S. W., 652. In view of the fact that the court nowhere told the jury upon whom the burden of proof rested to prove the main and only real litigated issue in the case, it was clearly the right of the plaintiffs to have the jury told that the defendant was legally charged with that burden; and the fact that the court had previously told the jury that the facts should be shown by a preponderance of the evidence did not change the rule. This was the crucial issue in the case. The testimony was flatly contradictory on the issue. Yellow Pine Oil Co. v. Noble, 101 Texas, 125; El Paso & S. W. Ry. Co. v. Foth, 101 Texas, 133.

Again, it is insisted that the trial court erred in giving to the jury special charge No. 2, requested by plaintiffs, which reads as follows: "You are instructed that the law gives to every person in this State

the right of self-defense, and upon the law of self-defense as is applicable to this case you are instructed that if, from the acts of said Dr. Keys, or from his words coupled with his acts, there was created in the mind of said J. T. McCoslin a reasonable apprehension that he, J. T. McCoslin, was in danger of losing his life or suffering serious bodily harm at the hands of the said Dr. Keys, then the said J. T. McCoslin had the right to defend himself from such danger or apparent danger as reasonably appeared to him, the said J. T. McCoslin, at the time, viewed from his standpoint. And a person so unlawfully attacked is not bound to retreat in order to avoid the necessity of killing his assailant. If you believe that the said J. T. McCoslin committed the assault on Dr. Keys, if he did do so, that he was in danger of losing his life or of serious bodily injury at the hands of the said Dr. J. H. Keys, then you will find for plaintiff and assess the damages as hereinbefore instructed."

The proposition is presented that this "charge assumes that Dr. Keys made an unlawful attack on J. T. McCoslin, and committed some act or uttered some words from which the jury might find that there was created in the mind of J. T. McCoslin a reasonable apprehension that said J. T. McCoslin was in danger of losing his life, whereas the great preponderance of evidence shows that as a matter of fact the said Dr. Keys made no unlawful attack on J. T. McCoslin, and had done no act nor uttered any word in respect to the said McCoslin until after the said McCoslin had opened fire on him with a pistol. The evidence shows that at the time McCoslin fired on Dr. Keys the latter had his back turned to McCoslin, and the first notice he had was when McCoslin began to swear at him and shoot at him." This proposition is not sustained. The charge was correct. Willson's Crim. Stats., vol. 1, p. 264, note 10. It instructs the jury that "if, from the acts of said Dr. Keys, or from his words coupled with his acts, there was created, etc., a reasonable apprehension" of danger to deceased at the hands of Dr. Keys, he had a right to act. etc., and does not assume the character of Dr. Keys' acts or words, but leaves the jury to determine them. It is not material that the apparent preponderance of the evidence may be one way or the other. Plaintiffs had a right to have the law applicable to their testimony submitted to the jury.

The issue as to who was the aggressor in the unfortunate difficulty resulting in the death of J. T. McCoslin was one for the jury to decide, and we feel bound by their verdict. Woodmen of W. v. Torrence, 103 S. W., 652.

It follows from the foregoing remarks that the court did not err in refusing appellant's requested instruction to find for defendant.

Finding no reversible error in the record the judgment is affirmed.

Affirmed.

Writ of error refused.

J. M. LONG v. F. MOORE.

Decided March 12, 1910.

1.—Promissory Note—Failure to Endorse Credits—Judgment not Conclusive.

The maker of a promissory note paid from time to time to the agent of the payee sundry amounts with instructions to credit the amounts on the note, which the agent promised but failed to do; after maturity of the note the payee brought suit for the full amount of the note, interest and attorney's fee; the citation served on the defendant showed that the suit was for the face of the note and no credit was given for the payments which had been made; the defendant was in bad health, almost deaf, lived thirty miles from the court, and, being a railway station agent, could not leave his place of business to attend the court without risk of losing his position; he relied on the promise of the plaintiff, at the time the payments were made, to give him credit for the same, and made no defense to the suit; the plaintiff took judgment for the face of the note, interest and attorney's fee; when execution was issued on the judgment, defendant paid the same and subsequently brought this suit to recover from the payee the sums of money received by him and which he failed to credit on the note and judgment. Held, the judgment in the first suit was not a bar to this suit, nor was the defendant guilty of such negligence in failing to make his defense in the first suit as would preclude him from maintaining this suit.

2.—Usury—Recovery.

A cause of action to recover usurious interest does not exist until the interest has been actually collected and received by the payee. The recovery provided for in article 3106, Rev. Stats., can only be had in an action therefor and not necessarily by a purely defensive pleading setting up usury and payment; the right of recovery is a cause of action and not a mere defense. Therefore a judgment on a note including usurious interest can not be pleaded in bar of a suit to recover the penalty for receiving usurious interest.

3.—Same—Statute Construed.

The Act of the Thirtieth Legislature amending article 3106 of the Revised Statutes (Gen. Laws, 1907, p. 277) is prospective, operating only upon payments of usury after the Act took effect.

Appeal from the County Court of Johnson County. Tried below before Hon. J. B. Haynes.

Walker & Baker, for appellant.—A defendant who omits to plead and prove partial payments on the debt involved in a suit, is concluded by the judgment, and can not afterwards maintain a suit to recover such payments. Dwyer v. Rippetoe, 72 Texas, 538; Thompson v. Lester, 75 Texas, 523; Brown v. Renfro, 63 Texas, 602; Henderson v. Terry, 62 Texas, 284; Freeman v. McAnninch, 87 Texas, 132.

As this was a direct attack on the judgment previously rendered in the Justice Court, the court erred in authorizing the jury to find for appellee for the payments he claimed to have made, for two reasons: (1) The appellee discovered, September 7, 1906, the day he satisfied the judgment, eleven days after the rendition of the judgment, that judgment had been rendered for the full amount, and he could have and should have taken the case to the County Court by writ of certiorari; (2) if the appellant was guilty of fraud in taking judgment for the full amount of the note, then appellee could have instituted a direct proceeding to set aside the judgment. Having

failed to avail himself of either of these remedies, he should not be permitted to attack the judgment collaterally, as in this case. Mikeska v. Blum, 63 Texas, 46; Capt v. Stubbs, 68 Texas, 224; Williams v. Haynes, 77 Texas, 285; Cage v. Ownes, 103 S. W., 1191; Hamblin v. Knight, 81 Texas, 351.

If the appellant collected unlawful interest from the appellee, the same was a defense that could have been urged by him in the suit against him on the note, and, having failed to appear and plead the same, he is concluded by the judgment rendered in that case, and his alleged cause of action for the penalty was merged in the judgment on the note. Henry v. Sansom, 2 Texas Civ. App., 150; 2 Black on Judgments, sec. 759; 2 Am. & Eng. Ency. Law, 558.

As the penalty clause of article 3106 was repealed by the amendment of 1907, without a saving clause in favor of pending suits, it was error for the court to authorize the jury to find in favor of the appellee for a penalty. Jessee v. De Shong, 105 S. W., 1011; Insurance Co. v. Ritchie, 5 Wallace, 540; South Carolina v. Gaillard, 101 U. S., 433.

J. M. Moore, for appellee.

TALBOT, ASSOCIATE JUSTICE.—This suit was brought by the appellee against appellant in the Justice's Court of precinct No. 1 of Johnson County, Texas, to recover certain sums of money, aggregating sixty dollars, paid by appellee to appellant to be credited on his note held by appellant for the sum of $72, which appellee alleges appellant fraudulently failed to do, and to recover the penalty provided by statute for charging and collecting usury. From a judgment in favor of the plaintiff in the Justice's Court the defendant appealed to the County Court, in which latter court judgment was again rendered for the plaintiff, and the defendant from that judgment appealed to this court.

There is no controversy over the pleadings, and the evidence is without conflict. Appellant was engaged in lending money in the town of Cleburne, Texas, in 1905, and for such business maintained an office there. M. M. Bauldwin was the agent of appellant in such office and made loans for appellant. On December 30, 1905, appellee applied to Bauldwin for a loan of sixty dollars for sixty days. Bauldwin, as the agent of appellant, let appellee have the sum applied for, charging him $12 for the loan of the money, and took his note for $72 due in sixty days payable to appellant, and a mortgage on appellee's piano to secure the payment of said note. Afterwards, and at different times from March 20, 1906, up to and including July 5, 1906, appellee paid to appellant's said agent, Bauldwin, at his office in Cleburne, the several sums of money aggregating $60, as alleged in his petition, with instructions to place such sums to his credit on his said note. At the time such sums were paid appellee was the agent of the Texas Central Railway Company and in charge of its station at Morgan, distant from Cleburne about thirty miles. He sent the several sums, paid to appellant, through his agent Bauldwin, to his wife at Cleburne, with instructions to pay them to appellant on his note.

This was done, and in each instance Bauldwin promised to credit such sums on the note and stated that a receipt was unnecessary. Neither appellant nor his agent Bauldwin appeared in court on the trial of this case, nor did they in any way attempt to controvert or disprove the above facts.

On July 24, 1906, appellant sued appellee on the $72 note, and on July 27, 1906, citation was served upon him, commanding him to appear and answer such suit, showing that appellant had sued him for the full amount of said note. Appellee did not appear in person in said suit, nor did he file answer or otherwise appear therein, and on August 27, 1906, judgment by default was taken against him by appellant for the sum of $86, being the principal, interest and attorneys' fees evidenced by the said note sued on, with a foreclosure of the mortgage lien on appellee's piano. On September 7, 1906, under an order of sale issued on the judgment against appellee, his piano was seized by the constable, and, to prevent a sale thereof, appellee's wife borrowed the money and paid off and satisfied said judgment in full. At the time appellee was sued on the $72 note and the judgment thereon rendered against him he was still in the railway service at Morgan, and was the only person in charge of the railway station at that place. The reasons given by appellee for not appearing and pleading the sums paid to appellant as credits on the $72 note are that there was no one to leave in charge of the railway office at Morgan, and he could not leave to attend court; that his health was bad, and he had confidence in the defendant, and thought he had or would credit the note with the sums he had paid him, as Bauldwin had promised and agreed to do so.

The first proposition contended for by appellant is, in effect, that the appellee, having omitted to plead and prove, in appellant's suit on the $72 note, the payments made on said note, he is concluded by the judgment rendered in that suit, and can not maintain this suit to recover the sum of such payments. On the other hand, the appellee contends that where payments upon a debt are made, and the creditor afterwards sues on the debt and the debtor makes default, and the creditor takes judgment for the full amount of the debt and collects the judgment, the debtor may afterwards sue and recover the amount of such credits or payments.

A decision of the question is not without difficulty. It is held in some jurisdictions that it is as much the duty of a party, when sued, to plead payment as it is to plead any other defense which he may have; and if he fails to do so, unless excused by equitable circumstances, and judgment is rendered against him for too much, he cannot make that recovery the ground of a new action. The doctrine is grounded upon the maxim, *interest reipublicae ut sit finis litium*. Doyle v. Reilly (18 Iowa), 85 Am. Dec., 582, and authorities therein cited. The only cases passed upon by our own courts in which the principle was involved, so far as we are advised, are the cases of Clay v. Clay, 13 Texas, 195 and Dickenson v. McDermott, 13 Texas, 252.

The suit in Clay v. Clay, supra, was founded upon a judgment rendered in the State of Kentucky, and the defendant pleaded payments made after the suit was instituted in Kentucky and before the judg-

ment was rendered. It was contended that, not having offered his payments in evidence on the original trial, the defendant was precluded from availing himself of them as grounds of defense in the suit brought upon such judgment. In holding against such contention the Supreme Court of this State, after admitting that the position in its general application was well sustained by authority, said: "The rule, so far at least as it forever precludes the defense of payment, is not founded on morality or honesty, but on a principle of public policy that there should be some broadly marked line at which litigation should come to an end; . . . that this is a statutory principle is acknowledged, . . . but that it should be so rigorously applied as in all cases to exclude evidence of payment which might have been set up in the first action had the defendant been vigilant, is doubted." Then, after stating that the principle which would require such a sacrifice to its authority as the payment twice of the sum involved in the case cited, must indeed be potential, the learned judge delivering the opinion of the court, in speaking of the character of the defense of payment, says that it is certain that such defense is always just; that "it, in fact, extinguishes the demand of the plaintiff *pro tanto.*"

In the case of Dickenson v. McDermott, *supra,* the Supreme Court makes use of the following language: "Where a payment (especially after the commencement of suit) is made in confidence that it will be credited, and particularly where there is an agreement to that effect, and the credit is not given but judgment is taken for the whole amount, the party wronged may have his remedy by injunction; or if he be compelled to pay the judgment he may by action recover the sum twice paid."

The facts and circumstances characterizing this case are sufficient, it seems to us, to bring it within the principle announced in the cases from which the above quotations are made. We are not disposed to adhere fully to the rigorously general rule referred to in the case of Doyle v. Reilly, *supra,* but hold to the view that if the payment itself will not "raise the presumption of a confidence that due credit should be given, and relieve the defendant from vigilance to prevent the possible dishonesty of the plaintiff from taking judgment for the whole amount of the debt, slight additional circumstances should certainly have that effect." In the instant case there was a positive agreement to credit the payments. Appellee was in bad health, almost deaf, and thirty miles from the court. He had confidence, he says, in appellant, and believed he would credit the note with the sums paid him. He was engaged in the exacting service of a railway company, the quitting of which for the time necessary to defend appellant's suit on the $72 note would very likely have cost him his position. The contention of counsel for appellant to the effect that the principle does not apply in a case like the present, where the payments were made before the commencement of the action on the debt, is not, in our opinion, sound. While the fact that the payments were made after the institution of suit may furnish an additional reason for the presumption of a confidence that they would be duly credited, and strengthen the argument in favor of the right to recover the amount of such payments in an action therefor, when they have not been allowed but judgment

taken for the entire debt, yet that is not the controlling fact in determining the application of the rule under discussion. The right to recover such payments rests upon the specific agreement to give the credits; the trust and confidence reposed in the creditor that he will honestly carry out such agreement, and the debtor's failure to defend upon the faith thereof. In the present case, when the payments were made, appellant distinctly promised and agreed to allow and endorse them as credits on the note, and the appellee testified that he had confidence in him, and believed he would do so; that for that reason he did not defend the suit on the note, and did not know appellant had taken judgment for the full amount of the note until in September, 1906, when his piano was levied upon to pay the debt. The fact that it appeared from the citation that appellant had sued for the full amount of the note was not conclusively notice to appellee that the credits had not been endorsed on the note, or would not be given at the trial. That the creditor, in suing on a debt upon which partial payments have been made, declares upon the whole debt without mention of the credits to which the debtor may be entitled, is not an infrequent practice in this and, doubtless, other States. This is illustrated in the case of Holland v. Cook, 10 Texas, 244. In that case the suit was on a promissory note claiming the amount due on its face without mention of certain credits endorsed thereon. Judgment was taken by default for the whole amount of the note; but upon appeal it was held that the judgment should not have been for the amount claimed, but for the amount of the indebtedness remaining unpaid after making due allowance for the credits endorsed on the note. Without further discussion of the question we will say that, in our opinion, the facts and circumstances under which the appellee acted were sufficient to excuse his neglect in availing himself of the payments made on the $72 note by way of defense to the action on said note, and that he is not precluded by reason of such neglect to recover in the present action the amount of such payments.

Appellant further contends that the trial court erred in refusing to direct the jury, as requested by him, to return a verdict in his favor as to appellee's alleged cause of action for the usury penalty. In this contention we do not concur. The proposition to the effect that, if appellant collected unlawful interest from the appellee, the same was a defense which should have been urged by him in appellant's suit on the note of $72, and that, having failed to plead the same in that suit, appellee's cause of action for the penalty sought to be recovered is merged in and concluded by the judgment on said note, can not be maintained. This branch of appellee's suit is not to recover the interest collected by appellant from him, but is an action founded on article 3106, Rev. Stats., which provides that if usurious interest shall be received or collected, the person paying the same may, by action of debt instituted in any court of this State having jurisdiction thereof, recover from the person receiving the same double the amount of the interest so received or collected. In Rosetti v. Lozano, 96 Texas, 57, it is said by our Supreme Court that "the recovery provided for in the above statute can only be had in an action therefor, and not merely by a purely defensive pleading setting up usury and payment. The right

of recovery is a cause of action, and not a mere defense;" and, as argued by appellee's counsel, this cause of action did not exist when appellant took his judgment on the $72 note, but accrued afterwards when appellee paid said judgment. It was then appellant, in the language of the statute, "collected and received" the unlawful interest which gave to appellee his cause of action to recover the penalty. Hence no question of former adjudication arises on the facts. Appellee could not have set up his "cause of action" in the suit of appellant against him on the note because he had not paid the unlawful interest or any portion of it; and he does not attempt to assail the judgment rendered thereon, nor will the relief he seeks annul or in anywise modify said judgment. It has been submitted to and satisfied. (Shirley v. Trobus (Ky.), 2 S. W., 656.) Under the case of Rosetti v. Lozano, *supra,* it would seem that, where a party has paid the unlawful interest at the time he is sued on the debt, he may, by cross-action in such suit, recover the statutory penalty for collecting such interest; but he is not compelled to file such cross-action to avoid an adjudication of such right against him. He may, at his election, in such case file the cross-action, or by an independent suit seek a recovery of such penalty. That the Act of the Thirtieth Legislature amending article 3106 of the Revised Statutes is prospective, operating only upon the payments of usury after the Act took effect, or does not change the penalty for charging and receiving usurious interest, is affirmed respectively by the cases of Stewart v. Lattner, 53 Texas Civ. App., 330 (116 S. W., 860), and Baum v. Daniels, 55 Texas Civ. App., 273 (118 S. W., 754).

The other assignments need not be discussed. We have carefully examined them, and such as have not been disposed of by what has already been said point out, in our judgment, no reversible error. Believing that a just and proper judgment has been rendered in the case, it is in all things affirmed.

Affirmed.

L. LANGLAY ET AL. v. N. J. SMITH ET AL.

Decided March 12, 1910.

Taxation—Unequal Valuation.

The Constitution requires equality of taxation; therefore whether property is valued for taxation at its full market value or at only a certain percent of said value the same rule must be applied as to the property of all tax payers. In a suit to enjoin the collection of taxes upon national bank stock upon the ground that the value placed upon it by the Board of Equalization was proportionately greater than that placed on other property by said Board, petition considered and held to state a good cause of action.

Appeal from the District Court of Hill County. Tried below before Hon. W. C. Wear.

Chas. L. Black and *Morrow & Smithdeal,* for appellants.—The court erred in sustaining the general demurrer to plaintiffs' petition

because the matters and facts therein set up entitled the plaintiffs to the relief prayed for. First Nat'l Bank of Lampasas v. Lampasas, 33 Texas Civ. App., 530; Lively v. Missouri, K. & T. Ry. Co., 102 Texas, 545; Ex parte Ft. Smith & Van Buren Bridge Co., 36 S. W., 1061; Cummings v. National Bank, 101 U. S., 153; Boyer v. Boyer, 113 U. S., 694.

N. J. Smith and *Ivy, Hill & Greenwood,* for appellees.—When a petition seeks an injunction to prevent the collection of a tax upon the ground of discrimination in the assessment and equalization of taxes, the plaintiff must show that his property has been assessed at more than its fair cash market value. The fact that his neighbor's property is assessed at a less percentage of its true or actual value than his own does not entitle plaintiff to recover. Especially is this true when the allegations in the petition fail to show collusion between and actual fraud on part of the tax officials. Engelke v. Schlenker, 75 Texas, 559; People v. Lots in City of Ashley, 13 N. E., 556; Alexander v. Thomas, 12 So., 708; McCurdy v. Prugh, 55 N. E., 154; Duck v. Peeler, 74 Texas, 268; Wagoner v. Loomis, 37 Ohio, 571; New York & Chicago G. & S. Ex. v. Gleason, 13 N. E., 204; Carroll v. Alsup, 64 S. W., 199; Keokuk & H. Bridge Co. v. Bertschi, 44 N. E., 207; Chicago, B. & Q. Ry. Co. v. Babcock, 27 Sup. Ct. Rep., 326; Albuquerque Bank v. Perea, 147 U. S., 87; Penobscot, C. F. Co. v. Inhabitants of Town of Bradley, 59 Atl., 83; City of Lowell, Mass., v. County Commissioners of Middlesex, 25 N. E., 470; Johnson v. Holland, 17 Texas Civ. App., 210; Coxe Bros. Co. v. Saloman, 59 N. E., 422; Ricketts v. Crewdson, 79 Pac., 1042.

RAINEY, CHIEF JUSTICE.—The appellants brought this suit against the officers of Hill County to enjoin the collection of certain taxes assessed against the stock owned by them in various national banks in Hill County for the year 1908. A general demurrer to the petition was sustained, and plaintiffs appeal.

The petition, after making averments as to names, places, amount of stock each owned, its value, etc., alleged, in effect, that said stock had been listed with the tax assessor of Hill County with a statement of the assets of said banks, etc.; that the Board of Equalization, without notice, valued said property, when, if notice had been given, plaintiffs would have appeared and protested. Said petition then proceeds:

7. "The plaintiffs further show that the said Board of Equalization imposed a tax on the surplus and profits of said banks, and in making the assessment aforesaid assessed said stock at eighty-five percent of its book value, and in reaching a conclusion as to its book value they added to the capital stock of said banks the value of its surplus and profits, and made said assessment upon said surplus and profits, and said assessment by reason thereof is void and without effect.

8. "The plaintiffs show to the court that they are informed and believe, and charge the fact to be, that on the first day of January, 1908, and at the time of the action of said Board of Equalization hereinbefore referred to, and for long time prior thereto, there existed in the State of Texas, and especially in Hill County, an established

and general custom to assess property for taxation at less than its full and fair market value, and that said Board of Equalization recognized and acted upon and in accord with said custom in equalizing property for taxation in Hill county in the year 1908, with reference to all property except the property consisting of the assets and stock of said banks. That pursuant to said custom said Board of Equalization, acting in the year 1908, as aforesaid, fixed and established the value of real estate throughout Hill County at about forty-one percent of its full and fair market value, and assessed and fixed the value of personal property, including other monied capital similarly invested in the hands of individual citizens, at about forty-one percent of its full and fair market value, with the exception of the said real estate and personal property of the plaintiffs, and that the said Board of Equalization at the time aforesaid, with full knowledge of said existing custom, and in recognition of the same, and with the design and intention to follow the same, listed and equalized real estate and personal property other than that of the said national banks at, to wit: the sum of forty-one percent of its full and fair market value, and intentionally, and pursuant to a definite system, with the design of imposing an unequal burden of taxation on plaintiffs, they arbitrarily fixed and assessed the value of the bank stock of the plaintiffs and each of them at eighty-five percent of its book value, being all of its full and fair market value. That the action of said Board of Equalization, in so fixing the value of other property at forty-one percent of its full and fair market value and in fixing the value of plaintiffs' bank stock at its full and fair market value, done in pursuance of said system intentionally followed as aforesaid, was an illegal and arbitrary discrimination against the plaintiffs, and constituted a legal fraud upon them, and was not, in fact, an equalization of their property with other property, but an intentional, systematical and arbitrary assessment of their property at more than double the proportionate value at which said Commissioners' Court, acting as said Board of Equalization, fixed the value of property, as aforesaid, belonging to other persons, as aforesaid.

9. "Plaintiffs show to the court that the rate of taxation in Hill County for the current year 1908, as fixed by the Commissioners' Court of said county, is 22 11/12 cents on the hundred dollars State tax, and 35 cents on the hundred dollars county tax, aggregating 57 11/12 cents on the hundred dollars.

"That if their property had been assessed according to the custom and system which was pursued intentionally by said Board of Equalization in equalizing the value of other property, the value of said stock would only have been fixed at not more than forty-one percent of its book value, and if other property had been assessed at the same rate of value as plaintiffs' was, the rate of tax would have been lower, to wit: about one-half the county tax above set out. That the plaintiffs give hereinbelow a statement showing the value at which said board assessed said stock; the amount of tax on said assessment; the tax which should have been assessed against said stock; and the excess over the tax which should have been assessed, said statement being as follows, to wit:

Name.	Assessed Value.	Tax on said asses'd value.	Tax which should be Assessed.	Excess.
1st N. Bk. Whitney.....	$31,875.00	$184.60	$ 91.35	$ 93.25
Cit. N. Bk	42,500.00	346.14	116.00	230.14
1st. N. Bk. Blum.....	36,465.00	211.29	99.22	112.07
1st. N. Bk. Itasca.....	80,750.00	467.67	220.40	247.27
Itasca N. Bk.	31,875.00	184.60	91.35	93.25
Sturgis N. Bk. Hillsboro.	119,085.00	556.40	271.67	284.63
Cit. N. Bk. Hillsboro....	75,470.69	440.17	206.01	234.16
Farmers' N. Bk.	70,095.25	398.96	170.43	228.53

"That said excess over the amount of the tax which should have been assessed as shown hereinabove is an arbitrary, illegal and fraudulent tax against the property of these plaintiffs by reason of the premises and allegations hereinabove set out. That the sum named hereinabove which should have been assessed and taxed against these plaintiffs for the year 1908 is the fair proportion of these plaintiffs of the taxes due and assessable against their property for the year 1908, and that by assessing said property at said amount same will be equalized with other property as aforesaid assessed throughout the State of Texas, and particularly in Hill County.

"That, notwithstanding the facts aforesaid, the said B. L. Hodge, tax collector as aforesaid, acting under the direction of the other defendants herein, is insisting upon the payment of said tax so illegally levied and assessed and equalized, and is threatening to levy upon the property of the plaintiffs to collect the same.

10. "Plaintiffs further show to the court that, at the time the assets of said banks were listed as aforesaid, the officers of the following banks rendered the stock of said banks at less than its book value, to wit, the amounts set out below, viz.: the stock of the following named banks was rendered as follows, and was raised by said board as follows:

Name of Bank.	Value rendered at per share.	Value raised to per share.
Itasca Nat. Bank	$ 73.33	$106.02
Farmers' N. Bank	88.81	140.19
Sturgis N. Bank	78.10	119.10
Cit. N. Bank Hillsboro.....	118.39	150.94
1st N. Bank Itasca	100.00	161.50

"That if the said Commissioners' Court had acted fairly and legally with reference to said banks, and had not pursued said illegal system and discriminated against them and against the stockholders thereof, they would have reduced said renditions of said banks when they sat as a Board of Equalization to not exceeding forty-one percent of the book value of said banks. That said Board of Equalization, acting pursuant to said system as aforesaid and with the intent of discriminating against the stockholders of said banks, not only failed to reduce said renditions to an amount which would have equalized them with other species of property, but without giving any

notice to the stockholders of said banks or to any of said stockholders of their intention to raise the said assessment and rendition, the said Commissioners' Court arbitrarily raised the value of said property as assessed for taxes to the sums hereinbefore stated, and in so doing they acted illegally and arbitrarily and contrary to law, and said assessments so made are, for the reasons stated, illegal and void. That if said notice had been given plaintiffs would have appeared and protested against said assessments.

"Plaintiffs show that under the laws of this State it is the duty of the State Tax Board to reduce the rate of taxation fixed by law in proportion to the value of property assessed for taxation, and by reason of said law and in making the assessment of plaintiffs' property at a greater proportion of its value than that at which other like property is assessed increases the burden of plaintiffs and on their property by raising the rate greater than it would be if other property was assessed at as great a proportionate value as plaintiffs' property, and said action of the defendants in fixing the assessment of other personal property at a rate less than its full value increases the burden on plaintiffs and their property for the reasons as aforesaid, in that the rate under the law is automatically adjusted in accord with the assessed value and the requirements of revenue.

"Plaintiffs further say that the acts of the defendants, in each of the subdivisions of this petition set out, deprive the plaintiffs of the benefit of the equal protection with other citizens of the law of this State and of the United States, and deprives them of the benefit of the laws and statutes of this State and of the United States with reference to the assessment and taxation of national bank stock, and deprives these plaintiffs of a property without due process of law, contrary to the laws and Constitution of the United States and the Fourteenth Amendment of said Constitution of the United States and other amendments thereof.

"Plaintiffs further show that, since this suit was filed, they have paid to the tax collector of Hill County all of the taxes which they are justly due upon their property as aforesaid, each of the plaintiffs paying said taxes in proportion to the number of shares of stock held by him, the aggregate of said taxes so paid being the amount alleged to be owing and which should have been assessed against the stockholders of the several plaintiffs as set out in subdivision 9 of this petition; and the plaintiffs say that in making said payments they desire to pay all the taxes which is justly and legally chargeable against them respectively, and that if any mistake be found in the calculation they here tender any additional amount that may be found to be due."

11. "The plaintiffs show to the court that, owing to the attitude and intention of the defendants to insist upon the payment and collection of said illegal taxes as aforesaid and hereinabove set out, the plaintiffs are threatened with a levy upon their property and with a multiplicity of suits harassing them with interminable litigation, and that in seeking their remedy against the defendants the issues presented by them involve the determination of the identical questions of law and fact, and that in the kind of relief demanded by them there is an identity, and that by invoking the equitable jurisdiction

of this court a multiplicity of suits and vexatious litigation will be avoided and all the issues determining the rights of plaintiffs and defendants in one suit. And plaintiffs show that the aforesaid threatened action of the defendants will cause the plaintiffs irreparable injury and deprive them of the equal protection of the law and deprive them of their property without due process of law.

"Plaintiffs show that the officers of the First National Bank of Whitney, the Citizens National Bank of Whitney, the First National Bank of Blum and the Itasca National Bank appeared before said Board of Equalization and protested against the action of said Board of Equalization as hereinabove set out, and that said action was taken over and against the said protest of the officers of the other banks hereinabove named.

"Wherefore plaintiffs pray that on a hearing hereof they have judgment against the said defendants enjoining them from the collection of said excessive taxes and cancelling said illegal assessments against them and each of them, etc."

The contention of appellees is that the petition shows on its face that the appellants' property was not assessed at more than its reasonable market value, but assessed at only eighty-five percent of said value; therefore plaintiffs were not entitled to relief. This was evidently the view taken by the learned trial judge and prompted his action in sustaining the general demurrer.

Appellees cite and quote an array of authorities, principally from othes States, which sustain the view of the proposition. In the case of Engelke v. Schlenker, 75 Texas, 559, Judge Henry, delivering the opinion of the court, adopted the view contended for by appellees, but in the case of Lively v. Missouri, K. & T. Ry. Company, 102 Texas, 545, the same court, speaking through Judge Brown, pronounces the statement of Judge Henry as dictum, and proceeded to hold, in effect, that where there was a discrimination, and property of one was assessed at a higher valuation than that of other citizens, thereby denying to the party the equality of taxation required by the Constitution, the party was entitled to relief. We quote from the opinion in the Lively case as follows: "The wrong which was inflicted upon the appellee was not in requiring it to pay taxes upon the full value of its property, but in denying to it the equality of taxation secured by the Constitution, which equality of taxation necessarily depends upon uniformity of assessment. In administering the remedy the court must take the course which is most practical to secure uniformity of valuation of the property to be taxed. This may be done either by increasing the assessment of each property owner in the county to its full value and to collect from each the taxes upon this full value, or to reduce the assessment of the intangible assets of the railroad company to 66 2/3 percent on the $100 of its assessed value. The court will adopt that plan which is most feasible and calculated to secure justice to the parties. The same question arose in the case of Taylor v. Louisville & N. R. R. Co., 88 Fed., 364, 31 C. C. A., 537. The learned judge who presided at the trial of that case recognized the difficulty and solved it, announcing his conclusion in the following forcible and clear language: 'How is it to be remedied?

It is said on behalf of the defendants that the only method consistent with the Constitution is by raising the assessments of the real and personal property. This is no remedy at all. It has been suggested (but we can not regard the suggestion as a serious one) that the railroad companies of the State should go before the taxing authorities of each county, and, after notifying each taxpayer, attempt to secure an increase in the total tax assessment of the real and personal property of the State from $312,000,000 to $416,000,000. The absolute futility of such a course, the enormous expense, and the length of time necessary in attempting to follow it, need no comment. . . . Therefore, to enjoin the enforcement of the prescribed method of assessment as to one species of property when there is a departure from it as to all others, if the injunction secures uniformity as to all, is not so great a violation of the method really prescribed as that involved in a continuance of the existing conditions, and the denial of relief to the injured taxpayer. The court is placed in a dilemma from which it can only escape by taking that path which, while it involves a nominal departure from the letter of the law, does injury to no one and secures that uniformity of tax burden which was the sole end of the Constitution. To hold otherwise is to make the restrictions of the Constitution instruments for defeating the very purpose they were intended to subserve. It is to stick in the bark, and to be blind to the substance of things. It is to sacrifice justice to its incident.' "

The Lively case, *supra,* is precisely in point, and the principle therein announced applies to and governs this case. The petition in this case alleges a discrimination and inequality of taxation as to the property of plaintiffs in that their property was assessed at eighty-five percent valuation while the property of all other citizens was assessed at forty-one percent valuation, and the court erred in sustaining the general demurrer thereto.

In justice to the trial judge we deem it proper to remark that the judgment in this case was rendered before the decision in the Lively case, and he evidently followed the opinion in the case of Engelke v. Schlenker, 75 Texas, 559. The judgment is reversed and cause remanded.

Reversed and remanded.

GARZA & COMPANY v. JESSE FRENCH PIANO & ORGAN COMPANY.

Decided March 12, 1910.

1.—Plea in Abatement—Pendency of Another Suit.

The mere fact that a suit is pending in another county to rescind a contract of purchase of certain personal property and to cancel the notes given for the same, is not sufficient cause for the abatement of a suit subsequently instituted for the collection of said notes. The doctrine of the common law that a suit pending between parties precludes them from maintaining between themselves another suit on the same cause of action in courts of the same jurisdiction, is not enforced in this State.

2.—Promissory Note—Attorney's Fee—Pleading and Proof.

Promissory notes sued upon provided for ten percent attorney's fee if placed in the hands of an attorney for collection; the petition alleged that

plaintiff had been compelled to place the notes in the hands of an attorney for collection and to institute suit to collect the same; the proof showed that the notes were placed in the hands of an attorney for collection under an agreement that plaintiff would pay ten percent on the amount as attorney's fee and that said sum was reasonable. Held, judgment was properly rendered for said attorney's fee.

Appeal from the County Court of Dallas County at Law, Dallas County, Texas. Tried below before Hon. W. M. Holland.

Davis & Lipscomb, for appellants.

U. F. Short, for appellee.

BOOKHOUT, ASSOCIATE JUSTICE.—This suit was instituted by appellee, Jesse French Piano & Organ Company, a corporation, against Garza & Company, a partnership, to recover on certain notes executed by appellants and to foreclose a lien on the property for which the notes were given. Appellee alleged that it had sold to appellants one certain automatic electric piano; that appellants had executed to it, in part payment therefor, notes aggregating the sum of $530, all dated and payable at Dallas, Texas, to the order of appellee, each of said notes providing for ten percent attorneys' fees if placed in the hands of an attorney for collection; that to secure the payment of said notes appellants executed and delivered to the appellee a certain chattel mortgage upon said electric piano; that all of said notes are due and unpaid, and that appellee has been "compelled to place the same in the hands of an attorney for collection and to institute this suit to collect the same." Plaintiff also alleged that said notes bore interest from date at the rate of eight percent per annum. Appellee prayed for judgment for the amount due on the notes, including principal, interest and attorney's fees, and for a foreclosure of the lien evidenced by the chattel mortgage referred to.

Garza & Company filed a plea in abatement, in substance that on the 22d day of June, 1907, they brought a suit in the County Court of Bexar County, Texas, to rescind the contract for the purchase of the piano for which the notes sued upon in this case were given in part payment, and to cancel said notes for the reasons stated in appellants' petition in that action. They sued out a writ of injunction to restrain appellee from any transfer of the notes pending said action, which was served upon the appellee on the 24th day of June, 1907. Afterwards, on the 20th day of August, 1907, appellee brought this action upon the notes and to foreclose the mortgage against the piano for which they were given in part payment and which were secured by a mortgage, as stated in appellee's petition. The record does not show what answer was filed by appellee to the action brought by the appellants against the appellee in the County Court of Bexar County. That cause was tried and a judgment rendered for the plaintiff, which was reversed on appeal. See Jesse French Piano & Organ Co. v. Garza & Co., 53 Texas Civ. App., 346 (116 S. W., 150). A reference to the opinion in that case shows that the answer filed by the defendant therein was a general demurrer and general denial. The record

in this case only shows the bringing of the suit to rescind the contract and cancel the notes executed by appellants to appellee. The plea in abatement sets up the pendency of the suit in the County Court of Bexar County and insists that this suit should be abated and dismissed. The trial court overruled the plea in abatement, and his action in so doing is assigned as error.

Appellant cites the case of Worden v. Pruter, 40 Texas Civ. App., 118 (88 S. W., 434), as supporting its contention that the court erred in overruling its plea. That was a suit by Pruter brought in the District Court of Liberty County to recover a debt against the Raywood Rice Company. The suit was filed on April 25, 1904, and a writ of attachment issued and was served on the same day at 11:30 o'clock a. m. At 11 o'clock a. m., the 25th of April, 1904, other creditors of the defendant corporation presented to Judge Dwyer of the District Court of Bexar County a petition for the appointment of a receiver for said corporation. After considering the petition the judge made an order directing the clerk to issue forthwith a notice to the defendants to appear on a day named and show cause why a receiver should not be appointed as prayed for. It was held that the act of the District Court of Bexar County in receiving and considering the petition for the appointment of a receiver was an assumption of jurisdiction over the subject matter of the suit, and the order thereafter made appointing a receiver related back to the time when the judge began the consideration of the petition, and precluded a subsequent attachment from operating as a lien thereon.

The facts in that case are not analogous to those in the instant case. There the District Court of Bexar County acquired jurisdiction of the property before the attachment issued. The question here presented is: Did the suit on the notes and to foreclose the lien abate by reason of the fact that the makers of the notes had a suit pending to rescind the contract under which they purchased the piano, and cancel the notes? In our opinion the pending of the suit in the County Court of Bexar County was not cause for abating this suit. The doctrine of the common law that a suit pending between parties precludes them from maintaining between themselves another suit on the same cause of action in courts of the same jurisdiction, is not enforced in Texas. Townes on Pl., p. 453. The trial court did not err in overruling appellants' plea in abatement. Simmang v. Braunagel, 27 S. W., 1032; Ellis v. Tipps, 16 Texas Civ. App., 82 (40 S. W., 524); Olschewske v. King, 43 Texas Civ. App., 474 (96 S. W., 665). No relief was asked, except that the suit be abated and dismissed. We hold that the court did not err in overruling the plea. Payne v. Benham, 16 Texas, 367.

There was no error in the action of the court in entering judgment for $61.83 attorneys' fees. The notes provided for the payment of ten percent on their amount as attorneys' fees, if placed in the hands of an attorney for collection. They were placed in the hands of an attorney for collection, and the proof shows that appellants had agreed to pay ten percent on the amount as attorneys' fees, and that this sum was reasonable. The judgment is affirmed.

Affirmed.

B. H. WISDOM ET AL. v. SANDFORD WILSON ET AL.

Decided March 12, 1910.

1.—Appeal—Brief—Assignment of Error—Rules 29 and 30.

An assignment of error as filed in the trial court contained in the first paragraph explicited complaint that the judgment of the trial court was erroneous, and in subsequent paragraphs or subdivisions stated, in the form of propositions of law, the reasons for the contention. But the assignment as carried into appellant's brief omitted the first paragraph wherein the ruling of the court was explicitly complained of and the brief contained only the abstract propositions of law. Held, the brief did not comply with the requirements of rules 29 and 30 concerning the preparation of briefs, and the assignment was therefore not entitled to consideration.

2.—Wills—Construction—Executors—Powers.

A will contained the following provisions: "I give to my executors full and ample power to sell and convey and deliver any and all of my estate, both personal or mixed, and to pass a complete title to the purchasers, and the trust above set out shall apply only to the proceeds." . . . "The time of selling the real estate I may leave is left discretionary with my executors for a period of five years." . . . "As fast as any real estate is sold by them they shall distribute the proceeds at once." . . . "Except as to the real estate, my executors shall settle up and distribute my estate as speedily as they conveniently can, and as fast as any real estate is sold by them they shall distribute the proceeds at once." Held, the executors were vested with power to sell the lands belonging to the estate at any time during five years after their appointment, but not afterwards. It was not the intention of the testator that the executors must sell all the land remaining in their hands after the expiration of five years and divide the proceeds among the beneficiaries named in the will.

3.—Same—Power to Sell.

The power to sell is not inherent in the office of trustee; he has such powers only as are conferred by the instrument either expressly or by clear implication. A mere direction to divide property will not confer the power to sell; there must be some duty imposed the performance of which would require a sale.

4.—Same—Sale by Executors, Invalid.

A sale of land by executors considered and held invalid and unauthorized by the will under which they acted when construed as a whole.

5.—Same—Agency—Sale on Credit.

The power to sell land does not of itself imply authority to sell on credit; the presumption is that the sale is to be made for cash. But when the agent is authorized to sell on such terms as to him shall seem meet, he may grant a reasonable credit. A will construed as a whole, and held not to confer power upon the executors to sell land of the estate for one-fifth cash and the balance on credit, with the last payment maturing four years after date of sale.

6.—Administrator—Right to Sue.

After the appointment of an administrator with the will annexed he would have the exclusive right as against the legatees and devisees to sue for the recovery of property belonging to the estate.

7.—Executors—Resignation—Termination of Power.

It seems that the mere filing of an application by executors to resign their trust would not divest them of their powers as executors; such effect would only be produced when the court had granted the application.

Appeal from the District Court of Archer County. Tried below before Hon. A. H. Carrigan.

C. K. Bell, for appellants.—In the absence of some power conferred by a will, executors thereof or trustees created thereby have no power to sell the real property belonging to the estate. Blanton v. Mayes, 58 Texas, 422; Freeman v. Tinsley, 40 S. W., 835; Bartley v. Harris, 70 Texas, 181; Grimes v. Smith, 70 Texas, 217; Williams v. San Saba County, 59 Texas, 442; Terrell v. McGowan, 91 Texas, 254; Beach on Trusts & Trustees, secs. 449, 464; 28 Am. & Eng. Enc. Law, 1003; Rankin v. Rankin, 87 Am. Dec., 210, note; 18 Cyc., 317.

Where the objects for the accomplishment of which executors or trustees are authorized to sell real estate are at an end, the power to make such sale ceases, and when the purposes for which the estate was created are satisfied, the estate of the executors or trustees ceases to exist and their title becomes extinct. Moore v. Waco, 85 Texas, 206; Brown v. Harris, 7 Texas Civ. App., 665; Freeman v. Tinsley, 40 S. W., 835; Webster v. Cooper, 14 Howard, 499; Young v. Bradley, 101 U. S., 782; Beach on Trusts and Trustees, secs. 557, 560, 679; Stroup v. Stroup, 27 L. R. A., 523; Little v. Duncan, 64 Am. Dec., 762; Glover v. Stamps, 54 Am. Rep., 870; Miller v. Bingham, 36 Am. Dec., 58.

Where the instrument of creation places a definite limit upon the duration of the trust it will end at the end of that time. Daley's Lessee v. James, 8 Wheaton, 495; Wilkinson v. Buist, 10 Am. St. Rep., 580; Anderson v. Messinger, 7 L. R. A., N. S., 1108; Beach on Trusts and Trustees, 438; 22 Am. & Eng. Ency. Law, 1120, 1124; 28 Am. & Eng. Ency. Law, 949.

Where a trust is brought under the control of the court by the institution of a suit for a settlement, or where the executors or trustees have filed their resignations, the power of the executors or trustees to make the sale conferred by the instrument of creation is so far suspended that a sale of the trust property can not be made without the order or permission of the court. Beach on Trusts and Trustees, sec. 473.

An agent as an executor or trustee must strictly observe and conform to the powers conferred upon him, and where he is simply authorized to sell, he must sell for cash and has no power to sell on credit. Colvin v. Blanchard, 101 Texas, 231; 28 Am. & Eng. Ency. Law, 998; Mechem on Agencies, sec. 325; Lumpkin v. Wilson, 5 Heiskell (Tenn.), 555; Perry on Trusts, sec. 786a; Heath v. Lane, 62 Texas, 693; Rogers v. Jones, 13 Texas Civ. App., 453.

One whose property has been conveyed without authority is under no obligation to restore a consideration paid to the third party who was not entitled to receive it, and which has never reached him. Vogelsang v. Null, 67 Texas, 468; Bullock v. Sprowls, 93 Texas, 190; Mills v. Herndon, 60 Texas, 355; Webster v. Clark, 100 Texas, 335; 11 Am. & Eng. Ency. Law, 780; Taber v. Interstate B. & L. Assn., 91 Texas, 92.

Where the objects for the accomplishment of which the legal title to an estate is vested in executors or trustees are at an end. the estate

at once vests in the cestui que trust, and when the purposes for which the legal estate was vested in executors or trustees are satisfied, the title of the executors or trustees ceases and the legal title becomes at once vested in the beneficiaries. Beach on Trusts and Trustees, art. 410.

When the trustees refuse or neglect to bring a suit for the quieting of the title, it may be brought by the beneficiaries. Beach on Trusts and Trustees, art. 714; Bowdoin College v. Merritt, 54 Fed., 55.

A suit to annul a sale made by an executor, which for any cause was voidable, could not be maintained by an administrator de bonis non, but could only be maintained by the eventual owner of the property. McDonald v. Alford, 32 Texas, 36; Brown v. Franklin, 44 Texas, 564.

An administrator de bonis non with the will annexed has the power under the laws of Texas to maintain a proceeding to set aside a sale which for any cause was improperly made by a former executor. Todd v. Willis, 66 Texas, 704; Williams v. Verne, 68 Texas, 416; Willis v. Ferguson, 46 Texas, 504; Willis v. Ferguson, 59 Texas, 172; Roy v. Whitaker, 92 Texas, 353.

W. E. Forgy and *Stephens & Miller,* for appellee.—By the will of B. H. Wisdom, deceased, the title to the whole of his estate, including the property in controversy herein, was vested in George C. Wallace and William E. Cave, trustees, and the children and grandchild of said B. H. Wisdom, deceased, did not take said property, but were only entitled to the proceeds thereof. Prather v. McClelland, 76 Texas, 574; Bank of U. S. v. Benning, F. C. No. 908; Herring v. Patten, 18 Texas Civ. App., 147; Wood v. McClelland, 53 S. W., 381; McClelland v. McClelland, 37 S. W., 350; Collins v. McCarty, 68 Texas, 150; Matthews v. Darnell, 27 Texas Civ. App., 181; Wallace v. Campbell, 53 Texas, 234; Nichols v. Eaton, 91 U. S., 716; Broadway Natl. Bank v. Adams, 133 Mass., 170; Barnett's Appeal, 86 Am. Dec., 502.

The trust created by the will of B. H. Wisdom is an active and not a passive trust, and therefore the title to the property left by him at his death passed to the trustees and not to the cestuis que trust. Dulin v. Moore, 96 Texas, 135; Norton v. Leonard, 12 Pick., 152; Newhall v. Wheeler, 7 Mass., 189; Chapin v. Universalist Soc., 8 Gray, 580; Exeter v. Odiorne, 1 N. H., 232; Wright v. Pearson, 1 Eden's Ch., 125; Striker v. Mott, 22 Am. Dec., 646; Wood v. Wood, 5 Paige, 596; Neilson v. Lagow, 12 How., 110; Kirkland v. Cox, 94 Ill., 400.

Since the legal title to the land in controversy herein was in the trustees and has never been conveyed to Mrs. Belle Wisdom Bronston and B. H. Wisdom, Jr., they can not maintain this suit. Kirkland v. Cox, 94 Ill., 416; Chapin v. Universalist Soc., 8 Gray, 580.

Under the will of B. H. Wisdom, deceased, the trust therein and thereby created existed until a sale of all said estate was effected and the proceeds thereof distributed. Potter v. Couch, 141 U. S., 296; Rogers v. Jones, 13 Texas Civ. App., 453.

Inasmuch as by the terms of the will of B. H. Wisdom, deceased,

George C. Wallace and William E. Cave, who qualified as his executors, were made trustees and the title to said estate became vested in them, and inasmuch as by the terms of said will said trust was to continue until all of the property belonging to said estate was sold and the proceeds thereof distributed, the sale made by said trustees to Sandford Wilson in July, 1906, was neither voidable nor void, even though a part of the consideration thereof was four promissory notes which were secured by the vendor's lien upon the land in controversy. Rogers v. Jones, 13 Texas Civ. App., 453.

Inasmuch as in making the sale to appellee Sandford Wilson, George C. Wallace and William E. Cave, trustees under the will of B. H. Wisdom, deceased, acted as the holders of the title to the property conveyed and not as donees of a power to sell, it was necessary for them to take out ancillary letters of administration in Texas. Leggett v. Perkins, 2 N. Y., 297; Leggett v. Hunter, 19 N. Y., 453; Lovelady v. Davis, 33 Miss., 577.

DUNKLIN, ASSOCIATE JUSTICE.—B. H. Wisdom and Mrs. Belle Wisdom Bronston instituted this suit as devisees under the will of B. H. Wisdom, deceased, to recover two tracts of land situated in Archer County. B. H. Wisdom in the capacity of administrator with the will annexed of the estate of B. H. Wisdom, deceased, also intervened and asked the same relief prayed for by plaintiffs. George C. Wallace and W. E. Cave, acting as executors of the will, had executed a deed purporting to convey the property in controversy to Sandford Wilson. Other beneficiaries under the will were made parties defendants with Sandford Wilson. From a judgment in favor of Sandford Wilson plaintiffs and the intervener have appealed.

Appellee Wilson objects to the consideration of appellant's first assignment of error as copied in appellants' brief, because the same contains a statement of propositions of law without showing any ruling of the trial court upon any question and without challenging the correctness of any decision of the court. The following appears in appellants' brief:

"Appellants first assignment of error.—The attempted sale of the land by Wallace and Cave to the defendant, Sandford Wilson, was voidable, if not void, because:

"(a) No power of sale was conferred upon Wallace and Cave by the will of B. H. Wisdom, deceased.

"(b) If power of sale was conferred upon Wallace and Cave by the will of B. H. Wisdom, deceased, the duration of the time within which they were authorized to make such sale was limited to a period of five years from the probate of such will, and the attempted sale to the defendant, Sandford Wilson, was made after the expiration of such time.

"(c) If power of sale was conferred upon Wallace and Cave by the will of B. H. Wisdom, deceased, such power had terminated before the attempted sale to the defendant Sandford Wilson was made, since all of the debts due by B. H. Wisdom, deceased, at the time of his death, had been paid off and discharged, and since the

plaintiff, B. H. Wisdom, had come of age prior to the time of such attempted sale.

"(d) If power of sale was conferred upon Wallace and Cave by the will of B. H. Wisdom, deceased, such power had terminated before the attempted sale to the defendant, Sandford Wilson, was made, since they had resigned their position as executors or trustees (if they were ever such) and had tendered to the court their account in settlement of their executorship or trusteeship.

"(e) If power of sale was conferred upon Wallace and Cave by the will of B. H. Wisdom, deceased, they were only authorized to sell the real estate left by the said B. H. Wisdom, deceased, for cash, whereas they attempted to sell the said property partly for cash and partly on time."

The transcript shows the following as the assignments of error filed by plaintiffs and the intervener in the trial court:

"Come now the plaintiffs in the above entitled cause and file the following assignments of error upon which they rely in the prosecution of their appeal therein and say that the undisputed evidence having shown that the land in controversy belonged to B. H. Wisdom, deceased, at the time of his death, and that plaintiffs were heirs at law of and beneficiaries under the will of said B. H. Wisdom, they were entitled to recover the land sued for, and that the judgment rendered in the said case in favor of the defendants and in refusing plaintiffs the relief which they sought, was erroneous and against their just rights for the following reasons:

"(1) The attempted sale of the land by Wallace and Cave to the defendant, Sandford Wilson, was voidable, if not void, because:

"(a) No power of sale was conferred upon Wallace and Cave by the will of B. H. Wisdom, deceased.

"(b) If power of sale was conferred upon Wallace and Cave by the will of B. H. Wisdom, deceased, the duration of time within which they were authorized to make such sale was limited to a period of five years from the probate of such will, and the attempted sale to the defendant, Sandford Wilson, was made after the expiration of such time.

"(c) If power of sale was conferred upon Wallace and Cave by the will of B. H. Wisdom, deceased, such power had terminated before the attempted sale to the defendant, Sandford Wilson, was made, since all of the debts due by B. H. Wisdom, deceased, at the time of his death had been paid off and discharged, and since the plaintiff, B. H. Wisdom, had come of age prior to the time of such attempted sale.

"(d) If power of sale was conferred upon Wallace and Cave by the will of B. H. Wisdom, deceased, such power had terminated before the attempted sale to the defendant, Sandford Wilson, was made, since they had resigned their position as executors or trustees (if they were ever such) and had tendered to the court their account in settlement of their executorship or trusteeship.

"(e) If power of sale was conferred upon Wallace and Cave by the will of B. H. Wisdom, deceased, they were only authorized to sell the real estate left by the said B. H. Wisdom, deceased, for cash,

whereas they attempted to sell the said property partly for cash and partly on time.

"2. The plaintiffs had never received any of the proceeds derived from the attempted sale of the said property, and refused to ratify or in any way be bound by such attempted sale.

"3. The plaintiffs being heirs at law of and beneficiaries under the will of B. H. Wisdom, deceased, were entitled to maintain an action for and recover the land sued for either absolutely or on such conditions as the court might properly impose if the pretended sale of it to the defendant, Sandford Wilson, was void or voidable:

"(a) Because the will of the testator, B. H. Wisdom, deceased, vested the legal title to the property sued for in the beneficiaries under his will.

"(b) Because if the legal title to the property sued for had been vested by the will of B. H. Wisdom, deceased, in Geo. C. Wallace and W. E. Cave, either as executors or trustees, they had ceased to hold the same as such executors or trustees since, if they had been the executors or trustees of an active trust, the trust created had been accomplished and nothing further remained to be done by the trustees and the trust had thereby become dry and the legal title to the property sued for had vested in the beneficiaries in said will.

"(c) Because Geo. C. Wallace and W. E. Cave as executors or trustees (as the case may have been) having attempted to convey the property, they could not call in question the regularity of their own acts and, therefore, the *cestui qui trusts* were authorized to act in their own behalf and for the protection of their eventual interests.

"(d) Because Geo. C. Wallace and W. E. Cave as executors or trustees (as the case may have been) having resigned their said executorship or trusteeship, could not maintain an action for the purpose sought to be accomplished by this suit and, there being no administration upon the estate, the beneficiaries under the will were entitled to institute and maintain such suit.

"(e) Because under the laws of the State of Texas plaintiffs, if they did not hold the legal title to the property sued for, could as the *cestui qui trusts* for whom the legal title in said property was held, maintain an action for the purpose of having the pretended purchaser thereof declared to hold the same as the trustee for the beneficiaries under the will of the former owner thereof.

"(f) Because Geo. C. Wallace and W. E. Cave as executors or trustees, as the case may have been, having neglected to institute a suit for the purpose of removing the cloud upon the title of the property which was the subject matter of the litigation in this case occasioned through the attempted transfer by them of the same to the defendant, Sandford Wilson, they, as the beneficial owners of the property, were entitled to institute and maintain a suit for that purpose.

"(g) Because if Geo. C. Wallace and W. E. Cave had authority to sell the land, and if their attempt to do so was only voidable, the beneficiaries under the will of B. H. Wisdom, deceased, would alone have the right to maintain a suit for the purpose of having the transaction declared voidable."

"Comes now the intervener in the above entitled cause and files the following assignments of error upon which he relies in the prosecution of his appeal therein, and says that the undisputed evidence having shown that the land in controversy belonged to B. H. Wisdom, deceased, at the time of his death, and that intervener had been regularly appointed by the County Court of Brazoria County, Texas, administrator with the will annexed of the estate of B. H. Wisdom, deceased, and that he had duly qualified and at the time of the trial was acting as such, he was entitled to recover the land sued for, and that the judgment rendered in the said case in favor of the defendants, and in refusing intervener as the administrator with the will annexed of the estate of B. H. Wisdom, deceased, the relief which he sought, was erroneous and against his just rights for the following reasons:

"(1) The attempted sale of the land by Wallace and Cave to the defendant, Sandford Wilson, was voidable, if not void, because:

"(a) No power of sale was conferred upon Wallace and Cave by the will of B. H. Wisdom, deceased.

"(b) If power of sale was conferred upon Wallace and Cave by the will of B. H. Wisdom, deceased, the duration of time within which they were authorized to make such sale was limited to a period of five years from the probate of such will, and the attempted sale to the defendant, Sandford Wilson, was made after the expiration of such time.

"(c) If power of sale was conferred upon Wallace and Cave by the will of B. H. Wisdom, deceased, such power had terminated before the attempted sale to the defendant, Sandford Wilson, was made, since all of the debts due by B. H. Wisdom, deceased, at the time of his death had been paid off and discharged and since the plaintiff, B. H. Wisdom, had come of age prior to the time of such attempted sale.

"(d) If power of sale was conferred upon Wallace and Cave by the will of B. H. Wisdom, deceased, such power had terminated before the attempted sale to the defendant, Sandford Wilson, was made, since they had resigned their position as executors or trustees, if they were ever such, and had tendered to the court their account in settlement of their executorship or trusteeship.

"(e) If power of sale was conferred upon Wallace and Cave by the will of B. H. Wisdom, deceased, they were only authorized to sell the real estate left by the said B. H. Wisdom, deceased, for cash, whereas they attempted to sell the said property partly for cash and partly on time.

"2. The intervener, being administrator with the will annexed of the estate of B. H. Wisdom, deceased, was entitled to maintain an action for and to recover the land sued for, either absolutely or on such conditions as the court might properly impose, if the pretended sale of it to the defendant, Sandford Wilson, was void or voidable, and to have the pretended sale set aside and the land restored to him as such administrator to be administered under an order of court in due course of administration."

Rules 29 and 30, governing parties in the preparation of briefs for Courts of Civil Appeals (94 Texas, 659), read as follows:

"29. The appellant, or plaintiff in error, in order to prepare properly a case for submission when called, shall have filed a brief of the points relied on in accordance with and confined to the distinct specifications of error (which assignments shall be copied in the brief) and to such fundamental errors of law as are apparent upon the record, each ground of error being separately presented under the proper assignment; and each assignment not so copied and accompanied with its appropriate propositions and statements, shall be regarded as abandoned. The assignments as presented in the brief shall be numbered from the first to the last in their consecutive order; but it is not required that they shall be presented in the order in which they appear in the original assignment of errors filed in the office of the clerk of the trial court, and the numbers of such original assignments may be disregarded.

"30. The appellant or plaintiff in error in preparing his brief shall make a preliminary statement in general terms of the nature and result of the suit, such, for example, as the following: 'This was an action of trespass to try title, which was brought by the appellant against the appellee and in which judgment was rendered for the defendant.' This may, at the option of counsel for the appellant or plaintiff in error, be followed by a brief statement of the case and such other matters as may be deemed proper as an introduction to the assignments of error. Then shall follow the assignments. Each point under each assignment shall be stated as a proposition unless the assignment itself may sufficiently disclose the point, in which event it shall be sufficient to copy the assignment."

By reference to the above it will be noted that but one assignment was filed by plaintiffs in the court below, in the first paragraph of which complaint is made that the judgment rendered was erroneous, and the reasons stated for that contention are set out in subsequent paragraphs and subdivisions of the document in the form of propositions of law. The first assignment as copied in appellants' brief and shown above is a copy of some of those propositions of law, but the first paragraph of the assignment, wherein the ruling of the court assailed is stated, is not copied, and only by reference to the transcript can it be ascertained what ruling of the court we are called on to revise. This is clearly in violation of the rules, and the first assignment of error appearing in appellants' brief can not be considered. Stephenville Oil Mill v. James McNeill et al., 57 Texas Civ. App., 252, also opinion on resubmission of same case rendered October 23, 1909.

The remaining assignments appearing in appellants' brief are as follows:

"Third assignment of error by appellants, Mrs. Belle Wisdom Bronston and B. H. Wisdom.—The plaintiffs being heirs at law of and beneficiaries under the will of B. H. Wisdom, deceased, were entitled to maintain an action for and recover the land sued for either absolutely or on such conditions as the court might properly

impose if the pretended sale of it to the defendant, Sandford Wilson, was void or voidable:

"(a) Because the will of the testator, B. H. Wisdom, deceased, vested the legal title to the property sued for in the beneficiaries under his will.

"(b) Because if the legal title to the property sued for had been vested by the will of B. H. Wisdom, deceased, in Geo. C. Wallace and W. E. Cave, either as executors or trustees, they had ceased to hold the same as such executors or trustees, since, if they had been the executors or trustees of an active trust, the trust created had been accomplished and nothing further remained to be done by the trustees, and the trust had thereby become dry and the legal title to the property sued for had vested in the beneficiaries in said will.

"(c) Because George C. Wallace and W. E. Cave, as executors or trustees (as the case may have been), having attempted to convey the property, they could not call in question the regularity of their own acts and, therefore, the *cestui qui trusts* were authorized to act in their own behalf and for the protection of their eventual interests.

"(d) Because George C. Wallace and W. E. Cave, as executors or trustees (as the case may have been), having resigned their said executorship or trusteeship, could not maintain an action for the purpose sought to be accomplished by this suit and, there being no administration upon the estate, the beneficiaries under the will were entitled to institute and maintain such suit.

"(e) Because, under the laws of the State of Texas, plaintiffs, if they did not hold the legal title to the property sued for, could, as the *cestui qui trusts* for whom the legal title in said property was held, maintain an action for the purpose of having the pretended purchaser thereof declared to hold the same as the trustee for the beneficiaries under the will of the former owner thereof.

"(f) Because George C. Wallace and W. E. Cave, as executors or trustees, as the case may have been, having neglected to institute a suit for the purpose of removing the cloud upon the title of the property which was the subject matter of the litigation in this case, occasioned through the attempted transfer by them of the same to the defendant, Sandford Wilson, they, as the beneficial owners of the property, were entitled to institute and maintain a suit for that purpose.

"(g) Because, if George C. Wallace and W. E. Cave had authority to sell the land, and if their attempt to do so was only voidable, the beneficiaries under the will of B. H. Wisdom, deceased, would alone have the right to maintain a suit for the purpose of having the transaction declared voidable."

"Second assignment of error by the appellant, B. H. Wisdom, administrator with the will annexed of the estate of B. H. Wisdom, deceased.—The intervener, being administrator with the will annexed of the estate of B. H. Wisdom, deceased, was entitled to maintain an action for and to recover the land sued for, either absolutely or on such conditions as the court might properly impose, if the pretended sale of it to the defendant, Sandford Wilson, was void or voidable, and to have the pretended sale set aside and the land re-

stored to him as such administrator to be administered under an order of court in due course of administration."

It will be noted that both these assignments are likewise merely copies of propositions of law contained in the original assignments filed in the court below, and fail to show any ruling of the court to which those propositions relate. For the reasons given above, these assignments can not be considered.

No other assignments appearing in appellants' brief, and the record showing no fundamental error requiring a reversal, the judgment of the trial court is affirmed.

OPINION ON REHEARING.

On October 30, 1909, the judgment of the trial court in this case was affirmed because appellants' assignments of error were not presented in accordance with the rules prescribed for briefing, but afterwards a rehearing was granted and appellants given leave to file corrected briefs, which they have done.

B. H. Wisdom, a resident of McCracken County, Kentucky, died during the year 1896, leaving the following as his last will and testament:

"I, B. H. Wisdom, being of sound mind and disposing memory, do make and declare this to be my last will and testament.

"First. I devise all my estate, real, personal and mixed, wherever situated, to my executors hereinafter named, or to the one of them who may qualify as such, but in trust, however, and for the use and benefit and enjoyment of my three children and the descendant of my son, who is now deceased, each child or the descendant shall have an undivided one-fourth interest in the above devised property.

"Second. I give to my executors full and ample power to sell and convey and deliver any and all of my estate, both personal or mixed, and to pass a complete title to the purchasers; and the trust above set out shall apply only to the proceeds. But the purchaser or purchasers shall not be required to see to the application of the purchase money. The time of selling the real estate I may leave is left discretionary with my executors for a period of five years.

"Third. Except as to the real estate, my executors shall settle up and distribute my estate as speedily as they conveniently can, and as fast as any real estate is sold by them they shall distribute the proceeds at once.

"Fourth. The share of my grandson, Henry, his father and mother being dead, shall be held by my executors in trust for him until he shall arrive at the age of twenty-one years, and they shall pay to his guardian in the meantime a sufficient amount to maintain him and give him an education. If he should die before arriving at his majority his share of the estate shall pass to my surviving children or their descendants.

"Fifth. I direct that no inventory of my estate shall be filed in the County Court by my executors.

"Sixth. I appoint George C. Wallace and William E. Cave my

executors and request the County Court not to require of them or either of them any security as such executors.

"In witness whereof, I have signed my name this 2d day of June, 1896, in the presence of H. C. Overby and Henry Burnett, witnesses, who have also signed their names in my presence, and in the presence of each other.

"B. H. Wisdom.

"H. C. Overbey,
"Henry Burnett."

On the 9th day of November, 1896, the County Court of McCracken County duly probated the will and appointed George C. Wallace and W. E. Cave executors thereof, and the appointees duly qualified as such. The will was also probated in the County Court of Brazoria County, Texas, in 1897, but there was no appointment nor qualification of Wallace and Cave as executors in that court. The executors then took charge of the estate of the testator and continued to act as such until November 1, 1906, when the court who appointed them granted their application, theretofore filed in that court, to be relieved from further duties as executors, and appointed the Lexington Banking & Trust Company, of Fayette County, Kentucky, administrator of the estate of the testator with the will annexed.

The estate appears to have been large, consisting, in part, of several tracts of land situated in different counties in Texas and property in other States. During the summer of 1906, the executors agreed to sell to Sandford Wilson two tracts of land situated in Archer County, Texas, and aggregating eight hundred and fourteen acres, for an agreed consideration of four thousand and seventy dollars, one-fifth of which was to be cash and the balance in four equal instalments due, respectively, one, two, three and four years after date of the conveyance. On October 17, 1906, Wallace and Cave as executors of the estate executed and acknowledged a deed purporting to convey the land to Sandford Wilson, and sent the same to their agent in Texas, who there delivered it to Wilson, and the instrument was filed for record in Archer County, Texas, November 5, 1906. The deed recited the consideration previously agreed upon, and the cash payment together with the vendor's lien notes for the deferred payments, duly signed by Sandford Wilson, were forwarded to Wallace and Cave in Kentucky, but the same were not received by them until November 9, 1906, after their resignations had been accepted by the court and the Lexington Bank & Trust Company had been appointed administrator. Upon receipt thereof Wallace and Cave delivered the money and notes to the administrator.

B. H. Wisdom, a grandson, and Mrs. Belle Wisdom Bronston, a daughter of B. H. Wisdom, deceased, both beneficiaries of the will, instituted this suit to recover for each an undivided one-fourth interest in the land described in the deed of conveyance from the executors to Sandford Wilson, and for a cancellation of the deed. The facts above recited were alleged in their petition. Plaintiffs further alleged that long prior to the execution of the deed all the debts owing by B. H. Wisdom had been paid, and all the purposes

for which the trust created by the will in favor of Wallace and Cave had been fully accomplished, and the powers vested in the executors to sell property belonging to the estate terminated, and that therefore the conveyance made by them to Sandford Wilson was void. The following were made defendants in the suit: Sandford Wilson, H. D. Wilson, May Wallace, daughter of the testator and one of the beneficiaries in the will, and her husband, George C. Wallace, one of the executors, W. E. Cave, another executor, and the following named children of Nellie Cave, daughter and devisee of the testator and wife of W. E. Cave, she having died since the death of her father, namely, Belle Cave, Henry Cave, Mary Cave, Edward Cave, Nellie Cave, and Jack Cave, also the Lexington Banking & Trust Company, whose appointment as administrator was alleged. All the defendants except Sandford Wilson and H. D. Wilson were alleged to be residents of McCracken County, Kentucky. All the children of Nellie Cave, deceased, except Belle Cave, were minors without guardians, and the trial court appointed guardians *ad litem* to represent them in the suit.

After the institution of this suit and during the month of April, 1908, plaintiff B. H. Wisdom was appointed administrator with the will annexed of that portion of the estate of B. H. Wisdom, deceased, situated in Texas, the appointment being made by the County Court of Brazoria County, Texas, and the appointee duly qualified as such administrator. In his capacity as such administrator B. H. Wisdom then filed a plea of intervention in this suit, seeking a recovery of the land in controversy and a cancellation of the deed to Sandford Wilson, and in which he made substantially the same allegations of fact as were made in plaintiffs' petition and claimed a want of lawful authority in the executors to make the deed for the same reasons alleged by plaintiffs in their petition.

The record fails to show any written pleadings by defendants George C. Wallace and his wife, Mary Wallace, but all other defendants filed answers. The defendant Sandford Wilson filed pleas of general denial and not guilty. The Lexington Banking & Trust Company filed a general denial and a special answer claiming that the sale was authorized by the terms of the will, and W. E. Cave filed a general denial. Belle Cave, joined by her brothers and sisters, filed an answer alleging that they were heirs of Nellie Cave, deceased, that they had never ratified the sale in question, and prayed for judgment for an undivided one-fourth interest in the land in the event the court should decree a cancellation of the deed to Sandford Wilson. Plaintiffs and intervener dismissed as to defendant H. D. Wilson. Judgment was rendered in favor of Sandford Wilson for the land, and plaintiffs and intervener have appealed. The case was tried by the court without a jury, and the trial judge filed no conclusions of fact and law.

"It is well settled that the primary rule in the construction of wills is to ascertain and follow the intention of the testator." Blanton v. Mayes, 58 Texas, 424.

"A devise to the trustees and their heirs to the uses mentioned carries the legal estate to the *cestuis que use,* unless the will has

imposed on the trustees some duty, the performance of which requires the legal estate to be vested in them. And in that case they would take an estate commensurate with the exigencies of their trust." Webster v. Cooper, 14 How., 499.

"It is well settled that where no intention to the contrary appears, the language used in creating the estate will be limited and restrained to the purposes of its creation, and when they are satisfied, the estate of the trustee ceases to exist and his title becomes extinct. The extent and duration of the estate are measured by the objects of its creation." Young v. Bradley, 101 U. S., 782, quoting with approval from Doe v. Considine, 6 Wall., 458 (73 U. S., 869).

"No particular form of words is necessary to create a power of sale. Any words which show an intention to create such power, or any form of instrument which imposes duties upon a trustee that he can not perform without a sale, will necessarily create a power of sale in the trustee." 2 Perry on Trusts, sec. 766.

As we interpret the briefs filed in this case, the correctness of the foregoing general statements of legal principles is not questioned by counsel for either appellants or appellees.

We think it clear that by the terms of the will the legal title to all the estate, real as well as personal, was vested in the executors in trust for the purposes and uses therein stated. By the language, "The time of selling the real estate I may leave is left discretionary with my executors for a period of five years," and "as fast as any real estate is sold by them they shall distribute the proceeds at once," the executors were vested with power for five years after their appointment to sell any and all real estate belonging to the testator at the date of his death, whether or not such sales were necessary to pay indebtedness against the estate. Appellees contend that by the terms of the will the duty was imposed upon the executors named to sell all the real estate remaining in their hands after the expiration of five years and after payment of debts, and to divide the proceeds among the beneficiaries named in the will. Differently stated, appellee insists that the intention of the testator as expressed in the will was that no title to any of his real estate should vest in the beneficiaries named in the will, but that they should receive only the proceeds of the sale thereof by the executors. In support of this contention the following provisions of the will are cited: "I give to my executors full and ample power to sell and convey and deliver any and all of my estate, both personal or mixed, and to pass a complete title to the purchasers, and the trust above set out shall apply only to the proceeds. . . ." "The time of selling the real estate I may leave is left discretionary with my executors for a period of five years. . . ." "And as fast as any real estate is sold by them they shall distribute the proceeds at once. . . ." "Except as to the real estate, my executors shall settle up and distribute my estate as speedily as they conveniently can, and as fast as any real estate is sold by them they shall distribute the proceeds at once. . . ."

Appellee insists that as the testator failed to specifically direct a distribution of any of his property in kind, the language so quoted

from the will when read in connection with the first paragraph vesting the legal title in the executors, and the language used in the fourth paragraph requiring the share of the grandson to be held until he reaches the age of twenty-one years and providing that his share of the estate should pass to the other beneficiaries in the event of his death during minority, indicates an intention on the part of the testator that it should be discretionary with the executors for five years after their qualification to sell or to hold the real estate, but that after the expiration of that period it should be their duty to sell the real estate left on hand and distribute the proceeds among the beneficiaries in accordance with their interests as fixed by his will. In support of that contention, appellee cites McClelland v. McClelland, 37 S. W., 350; Prather v. McClelland, 76 Texas, 574; Wood v. McClelland, 53 S. W., 381; Blanton v. Mayes, 58 Texas, 429; Potter v. Couch, 141 U. S., 296; Kirkland v. Cox, 94 Ill., 400, and other authorities.

In all the decisions relied on by appellee, the rule that the intention of the testator, must govern was recognized and given effect, as must be done in this case. In the first paragraph of the will all the testator's estate, "real, personal and mixed," is devised and bequeathed to the executors in trust for the use, benefit and enjoyment of his three children then living and the descendant of his deecased son, and that paragraph concludes with the following language: "Each child or the descendant shall have an undivided one-fourth interest in the above devised property." Nothing is there said of proceeds of the sale of any property, but it is expressly stated that the interest devised to each beneficiary is an undivided interest in all the "property" owned by the testator. It is evident that the testator understood that the language used in the first paragraph had the legal effect to vest title to the property devised in the beneficiaries named, subject only to the power expressly given the executors in subsequent paragraphs to sell it, because in the second paragraph it was provided that in case of sale by the executors of personal or mixed property then "the trust above set out shall apply only to the proceeds." It is well settled that the power of sale is not inherent in the office of a trustee, but that he has such powers only as are conferred by the instrument either expressly or by clear implication. 31 Cyc., 1043-1053; Beach on Trusts and Trustees, 557; 2 Perry on Trusts, sec. 764; Young v. Bradley, 101 U. S., 782; Comby v. McMichael, 19 Ala., 747. In 2 Perry on Trusts, section 766, the author, after announcing the rule that a power to sell will be implied when a duty is imposed the performance of which will require a sale, says: "A mere direction to divide is not enough; there must be some active duty to perform." . . .

If the second, third and fourth paragraphs had been omitted, then the trust created by the first paragraph would have been a simple or dry trust only and the title of the beneficiaries to the estate would have been free from any power in the trustees to sell it. (Moore v. Waco, 85 Texas, 206; Brown v. Harris, 7 Texas Civ. App., 664, 27 S. W., 45; 2 Perry on Trusts, sec. 520.) The will was made solely for the benefit of the testator's three daughters and his

grandson, and only such powers of sale were conferred upon the executors as were necessary to enable them to discharge the duties imposed upon them by the terms of the will. It is important then to determine the character and scope of the duties of the executors as fixed by the terms of the will. The only duties expressly enjoined upon them were that they should settle the testator's debts and distribute his entire estate, except real estate, as speedily as practicable; that as fast as any real estate should be sold the proceeds of such sales should be distributed at once; that the share of the estate devised to the testator's grandson should be held for him until he should arrive at the age of twenty-one years, and that during his minority the executors should pay to his guardian a sufficient amount to maintain and educate him. If the sale of real estate was not necessary to pay the testator's debts, nor to maintain and educate his grandson, nor for an equitable partition thereof among the beneficiaries, then the only duty imposed upon the executors to sell real estate was the implied duty to do so if in their discretion they should deem such sales to be advantageous to the beneficiaries named in the will, but the discretion to sell real estate was not expressly given for a longer period than five years.

The record shows that B. H. Wisdom, Jr., the grandson of the testator and one of the beneficiaries in the will, arrived at the age of twenty-one years on July 24, 1904; that long prior to the sale of the land to Wilson in 1906 all the debts owing by the testator had been paid, and more than one hundred thousand dollars of proceeds arising from the sale of property belonging to the estate by the executors had been distributed to the beneficiaries named in the will. The executors had no order from any court directing the sale of the property in controversy and made no claim that a sale was necessary in order to equitably divide the property among the beneficiaries. They construed the will as appellee herein construes it, and sold the property for no other reason than they believed that by the terms of the will they were given the discretion to sell or not sell real estate for a period of five years from the date of their appointment, but that after the expiration of that period they were compelled to do so. The record does not show any distribution of the consideration paid by defendant Wilson for the land in controversy among the beneficiaries of the will, and fails to show that the executors were ever granted letters testamentary or of administration upon the estate by any court in Texas. To hold that by reason of the language used in the will, "The time of selling the real estate I may leave is left discretionary with my executors for a period of five years," in connection with other terms of the will, implies an intention on the part of the testator to impose upon the executors the duty to sell all real estate on hand after the expiration of five years and distribute only the proceeds thereof among the beneficiaries and to sustain the sale to Sandford Wilson upon that conclusion, would be to hold that the terms of the first paragraph of the will, vesting title to the entire estate in the beneficiaries therein named subject to the discretionary powers expressly conferred upon the executors to sell within a period of five years, could not, in any event, be given the

meaning which they plainly import. As announced by our Supreme Court in Moore v. Waco, 85 Texas, 211, "The governing rule in the construction of written instruments is 'that every part of the instrument should be harmonized and given effect to if it can be done. Hancock v. Butler, 21 Texas, 806.'" In no part of the will did the testator expressly direct the executors to sell real estate not required to pay debts and on hand after the period of five years, nor did he expressly impose any duty upon them the performance of which would require such sales. If the testator intended to impose upon the executors the duty to sell all real estate at all hazards, no plausible reason is perceived why he did not specifically so say, especially as the evidence shows that the will was drawn by an attorney at law employed for that purpose. Unless there is stronger reason for the conclusion that such an intention on the part of the testator is implied from all the terms of the will than for the conclusion that it is not so shown, then the latter conclusion, which is in harmony with the first paragraph and all other terms of the will, should prevail rather than the former conclusion which necessarily would result in ambiguity in the terms of that instrument.

When the will is construed as a whole we do not think it can be said that it shows an intention on the part of the testator to impose upon the executors the duty to sell real estate left on hand at the expiration of five years and not necessary to pay debts and the sale of which was not necessary to an equitable partition between the beneficiaries, but, to the contrary, we think it appears that he intended to limit the power of the executors to make such sales to the period of five years next succeeding the date of the probate of the will.

Furthermore, we are of opinion that the sale in controversy should be held invalid because a part of the consideration therefor was on credit. "So, trustees for sale must conform to their powers in other respects. If they are authorized by the power to sell on credit, they may sell on such credit as they are authorized to give; but, if the power is silent upon the subject of credit, they can not sell upon a credit. This rests upon the general principle that trustees are not authorized to invest the trust funds in promissory notes nor other mere personal securities; nor are they justified in converting the trust property into mere personal promises of anybody. Sales must generally be made for some particular purposes. If they are made for the purpose of distributing the property, the trustee can not make the distribution until he has obtained the money, and it is his duty not to endanger the funds by leaving it upon personal security." 2 Perry on Trusts, section 786a.

"The power to sell land does not of itself imply an authority to sell on credit. The presumption is that the sale is to be made for cash. But when the agent is authorized to sell on such terms as to him shall seem meet he may grant a reasonable credit. An authority to sell on credit, but not fixing the time to be given, implies a power to grant a reasonable time." Mechem on Agency, section 325.

"Power to sell imports a sale for cash. . . . Unless there is some language in the power of attorney justifying the inference that

other than cash sales were contemplated by the parties, a power to sell imports that the sale is to be in cash." 1 Devlin on Deeds, section 370. See also Skaggs v. Murchison, 63 Texas, 353.

While a more liberal rule obtains in construing wills than in the construction of powers of attorney, it is nevertheless true that, aside from powers conferred by the Probate Court, executors have such powers only as are given by the will, and if Wallace and Cave were authorized to sell the land at the time and under the circumstances the sale in controversy was made, then to justify their action in extending credit for four-fifths of the purchase money, with the last payment maturing four years after the date of sale, the conclusion must be reached that it was the intention of the testator, as evidenced by the terms of the will, to confer such a power upon the executors.

In the second clause of the will the testator provided that in the event of a sale of personal or mixed property the trust created should apply only to the "proceeds" and that the purchaser or purchasers should not be required to see to the application of the "purchase money." In the third paragraph it was provided that as fast as any real estate should be sold the executors should distribute the "proceeds at once." We think this language shows that the word "proceeds" was used in the sense of money, as in the second paragraph he used the term synonymously with "purchase money;" and in directing the immediate distribution of the proceeds of sale of real estate it would be more reasonable to conclude that he meant money which could be partitioned among the beneficiaries without difficulty, than to suppose that he contemplated that such proceeds might consist in part of promissory notes, a partition of which might be difficult. While the term is variable in significance, depending on its context, yet the construction we have applied accords with approved definitions. It is thus defined in Rapalje & Lawrence's Law Dictionary: "Proceeds . . . The sum, amount, or value of goods, etc., sold or converted into money." The publisher of Words & Phrases Judicially Defined, volume 6, page 5640, says: "The term 'proceeds,' when used in connection with a sale, means a sum of money derived from a sale of property."

It seems to us that a consideration of the will as a whole manifests the intent to provide for a speedy settlement of the estate, subject only to such delay as should be necessary in exercising the five year period of discretion given to sell lands, and the discharge of the duties having particular reference to the minor grandson. To adopt appellee's construction of the will and engraft thereupon a power to sell, long after the expiration of the five year period and long after the majority of the minor, for a small payment in cash and accept for the remainder the promissory notes of the purchasers maturing at long periods in the future, is to indefinitely prolong the trusteeship and defeat the generally manifested purpose of the testator to have a reasonably prompt settlement and distribution of his estate among the beneficiaries.

For the reasons above noted we conclude that the sale of the property in controversy to Sandford Wilson by Wallace and Cave as

executors was not authorized by the terms of the will, and that judgment should have been rendered in favor of the intervener, as administrator with the will annexed, against all the defendants for the land in controversy and for a cancellation of the deed to Wilson. After the appointment of the intervener as administrator he had the exclusive legal right to sue for a cancellation of the deed and to recover the property in controversy, and after his intervention was filed in this cause the plaintiffs' suit should have been dismissed. Belt v. Cetti, 100 Texas, 92.

The conclusions above reached render it unnecessary to determine appellants' further contention that if the executors were otherwise empowered to make the sale in controversy that power had been suspended before the attempted sale by reason of the fact that at that time their application to resign their trust was then pending in the County Court of McCracken County, Kentucky. However, as the record fails to show any action upon the application by that court prior to the attempted sale, it would seem that the contention last mentioned would be untenable. 2 Perry on Trusts, section 474.

Accordingly, the judgment of the trial court is reversed and judgment is here rendered dismissing plaintiffs' suit, and in favor of intervener in his capacity as administrator against all the defendants for the land in controversy, and for the cancellation of the deed described in plaintiffs' petition from Wallace and Cave, as executors of the last will of B. H. Wisdom, deceased, in favor of Sandford Wilson.

Upon the contentions of appellee Wilson, as stated above and more fully set forth in his brief, Justice Speer dissents from the foregoing conclusions by the majority and especially to the judgment rendering the cause upon the ground that the executors were not authorized to make a sale on credit. He thinks that on another trial the appellees might be able to show, and should be permitted to do so if they could, that a sale of such lands as these on credit was the custom of the country and that the testator had in mind such custom when he wrote the will.

Reversed and rendered.

Writ of error refused.

J. T. HAMMONS v. MOSES CLWER ET AL.

Decided March 12, 1910.

1.—Public Policy—Title by Limitation—Agreement—Statute of Frauds—Stale Demand.

H. and C. entered into an agreement to buy the claim of one holding possession of a section of land under a void tax deed and to acquire title thereto by ten years' occupancy. H. was to pay one-tenth of the purchase money, and C. nine-tenths; H., being a lawyer, was to advise C. as to all steps necessary to be taken to acquire limitation title, and C. was to hold possession of the land; the deed was to be taken in the name of C. and at the end of ten years one-fourth of the land was to belong to H. and three-fourths to C.; the agreement was complied with in all respects by H., but C. repudiated the agreement when the title was perfected by limitation and claimed the entire section for himself. In a suit by H. against C. for his in-

terest in the land, held, that the contract was not subject to the objections that it was inequitable because an attempt to acquire the property of another without paying therefor; that the contract was merely optional and not binding on C.; that H. paid nothing of value for the land; and that the contract contravened the statutes of fraud. It was error to sustain an exception to the petition on said grounds. Nor did it appear that plaintiff's demand was stale.

2.—Practice—Amending Pleading.

When a general demurrer to a petition is sustained, it is not incumbent on the plaintiff to amend his petition so as to meet the ruling of the court sustaining a special exception also.

Appeal from the District Court of Eastland County. Tried below before Hon. Thomas L. Blanton.

J. T. Hammons, for appellant.—The court erred in sustaining the defendant, Moses Clwer's general demurrer to the plaintiff's pleading herein filed. Henderson v. Rushing, 47 Texas Civ. App., 485; Gardner v. Randell, 70 Texas, 453; Lucia v. Adams, 36 Texas Civ. App., 454; Stafford v. Stafford, 29 Texas Civ. App., 73, 96 Texas, 106. Petition good on general demurrer, it alleges equitable cause, shows trust. Burdett v. Haley, 51 Texas, 540.

A joint acquisition of land and parol trust and parol contract is not within the statute of frauds, and a petition setting up the same is not open to a general demurrer, it not being a contract to buy or sell land as between plaintiff and defendant. James v. Fulcord, 5 Texas, 512; Neil v. Keese, 5 Texas, 23; Anderson v. Powers, 59 Texas, 213; Smock v. Tandy, 28 Texas, 130; Tiffany & Bullard on Law of Trusts, pp. 22, 24, 28 to 31, 97 to 98, 112. That Texas has no statute regulating trusts in land, ib., p. 454. Evidence: Andrews v. Jones, 10 Ala., 400 and 460; 1 Halstead's Laws of Ev., pp. 431 to 442; Hardy v. DeLeon, 5 Texas, 211; Edwards v. Barwise, 69 Texas, 84.

H. and C. jointly acquired land in 1884, and C. kept it in actual possession for H. as his tenant till 1907, at which time C. disclaimed his tenancy and then, and not until then, C. renounced H.'s title, and in less than one year H. brought suit for possession in trespass to try title, H.'s claim is not a stale demand. H. offering to do all equity in his prayer to his petition shows "clean hands." Gibbons v. Bell, 45 Texas, 417-420; Hughes v. Lane, 25 Texas, 356; Crosby v. First Presb. Church, 45 Texas Civ. App., 111; Clark v. Kirby, 25 S. W., 1096; Waller v. Leonard, 34 S. W., 799; Oury v. Sanders, 24 S. W., 341; 27 Am. & Eng. Ency. Law (1st ed.), 99, 100-104. When deed is absolute parol evidence to prove trust, 17 Am. & Eng. Ency. Law (1st ed.), p. 446; Leakey v. Gunter, 25 Texas, 400; Clark v. Watson, 5 N. E., 298.

Earl Conner, for appellee.

DUNKLIN, ASSOCIATE JUSTICE.—J. T. Hammons sued Moses Clwer and the heirs of Timothy Leahey, deceased, to recover one-fourth of a section of land patented to Timothy Leahey, and from

a judgment sustaining a general demurrer and special exceptions to his petition and dismissing the suit, he has appealed.

Following the allegations in the usual form of trespass to try title, plaintiff alleged specially that A. J. Stewart was holding said section of land under and by virtue of a void tax deed, and that plaintiff and defendant Moses Clwer entered into a parol contract by the terms of which they agreed to purchase Stewart's claim to the land by paying him therefor the sum of one hundred dollars, of which amount ten dollars was to be paid by plaintiff and ninety dollars by Clwer; that Clwer should then take possession of the land and acquire title thereto under the statute of limitation of ten years, and that plaintiff, who was a practicing attorney, should give such legal advice as was necessary to fully inform Clwer of all steps required to be taken in order to so acquire title to said land; that the deed from said Stewart should be taken in the name of Clwer and that when title by limitation was perfected as contemplated, one-fourth of said section should be the property of the plaintiff. Plaintiff further alleged that he furnished the ten dollars so agreed to be furnished by him; performed all other obligations which he had contracted to perform; that Clwer procured a deed from Stewart by paying him the sum of one hundred dollars and went into the possession of the land and held the same for more than ten years in such manner and under such circumstances as to perfect title in him under the statute of limitation of ten years; that while so holding possession of said land there was a parol agreement between him and plaintiff by the terms of which one-fourth of said land was partitioned to the plaintiff and three-fourths to Clwer; that the portion so partitioned to plaintiff was described in a deed from one Whittaker, which was in Clwer's possession, and that plaintiff was unable to specifically describe the same without an inspection of said deed which Clwer was notified to produce upon the trial of the suit; that it was agreed by and between plaintiff and Clwer that Clwer should hold possession of said land and perfect title thereto by limitation for the use and benefit of himself and plaintiff; that after title was so perfected Clwer repudiated said agreement and claimed title in himself to the entire section.

Appellee contends that the allegations of the plaintiff's petition show that the contract relied upon to sustain his suit was inequitable in that plaintiff and Clwer thereby undertook to acquire property without paying the owner any consideration therefor, and therefore plaintiff did not come into court with clean hands; that it appears from the allegations in the petition that the performance of the contract on the part of Clwer was not a binding contract on his part, but optional only; that it does not appear that plaintiff paid anything of value or bound himself to perform any act which would constitute a valuable consideration for the purpose of acquiring said land, and that the contract alleged was in contravention of the statute of frauds.

The right to acquire title to land by limitation is given by our statutes, and we fail to see how it can be said that an agreement between two parties to so acquire such a title could be termed wrong-

ful or inequitable. The allegation in the plaintiff's petition that Stewart held the land under the tax deed, we think, was equivalent to an allegation that he was in possession of the same, and the other allegations in the petition should be construed as allegations that in consideration of the payment to Stewart of the one hundred dollars, Clwer acquired possession. This of itself we think sufficient to show a valuable consideration for Clwer's agreement that one-fourth of the section of land should become the property of plaintiff when title to the section was perfected as contemplated by the agreement. The contract alleged imports binding obligations upon Clwer and not merely an option on his part to perform or not to perform the same at his election. Neither was the contract alleged in contravention of the statute of frauds. Henderson v. Rushing, 47 Texas Civ. App., 485 (105 S. W., 840); Gardner v. Randall, 70 Texas, 453; Lucia v. Adams, 36 Texas Civ. App., 454 (82 S. W., 335).

We think the allegations of the petition were sufficient to show a right of recovery in the plaintiff as against the general demurrer, and that the court erred in sustaining the demurrer.

We do not think that the petition showed stale demand on the part of plaintiff as held by the court in sustaining plaintiff's tenth special exception.

The second special exception was in effect that the petition was insufficient in that the date of the alleged parol agreement for partition of the section between plaintiff and Clwer was not alleged, and that no sufficient excuse is given for failure to allege the same. We feel inclined to hold that the exception was properly sustained, but as the general demurrer was also sustained it was not incumbent upon the plaintiff to amend the petition so as to meet the ruling of the court on the special exception. We suggest, however, that upon another trial the petition should be amended so as to set out the date and attendant circumstances of the parol agreement of partition as fully as plaintiff is able to do so.

Other special exceptions were sustained presenting the same questions that have been discussed above in the determination of the merits of the general demurrer.

The suit was against Moses Clwer and the heirs of Timothy Leahey, deceased. The heirs of Timothy Leahey are named in the petition and the petition contains an allegation that the heirs so named are dead, and their heirs are not made parties defendant. Of course, the suit can not be prosecuted against the heirs of Timothy Leahey, deceased, if those heirs are dead. We have thought it proper to refer to these allegations in the petition to the end that it may be properly amended and the proper parties cited before the case is again tried.

For the errors above indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

C. H. DYE v. CHICAGO, ROCK ISLAND & GULF RAILWAY COMPANY.

Decided March 12, 1910.

1.—Damages—Death of Son—Pleading.

Where a parent sued to recover damages sustained by reason of the death of his minor son, and for nothing more, he can not complain that the charge of the court denied him a recovery for loss of time by the son during his illness resulting from injury, and expenses incurred by the plaintiff for medical treatment for the son.

2.—Same—Contributory Negligence—Burden of Proof—Charge.

In a suit for damages for personal injuries resulting in the death of plaintiff's minor son, wherein defendant plead contributory negligence on the part of the son, charge considered and held not subject to the criticism that it placed on the plaintiff the burden of sustaining defendant's plea of contributory negligence.

3.—Master and Servant—Negligence of Servant—Rebutting Evidence.

Where, in a suit by a parent for damages for the negligent killing of his son, the plaintiff pleads and introduces evidence tending to show that the son was injured by the negligence of a coworker, but does not charge the defendant with negligence in the selection of the coworker, it was error to permit the defendant to introduce testimony to the effect that the coworker was a good and careful man and did his work well.

4.—Charge—Burden of Proof—Undue Emphasis.

Charge considered and held subject to the objection that by repetition of the subject of burden of proof it gave undue emphasis to that issue to appellant's prejudice.

Appeal from the District Court of Carson County. Tried below before Hon. A. A. Lumpkin, Special Judge.

L. C. Barrett, J. M. Jones, Sidney O'Keefe and *Fayette Ratliff,* for appellant.

N. H. Lassiter, Robert Harrison and *Turner & Boyce,* for appellee.

DUNKLIN, ASSOCIATE JUSTICE.—C. H. Dye instituted this suit to recover of the Chicago, Rock Island & Gulf Railway Company for the death of his son, Lewis H. Dye, and from a judgment in favor of the defendant plaintiff has appealed.

Lewis Dye was employed by the defendant company as a section hand, and while unloading ties from a moving train his hand was injured. The injury occurred on May 2, 1908, and the boy died May 24, 1908, in the eighteenth year of his age. Plaintiff alleged that said injury caused the death of his son and sought to recover for loss of his services during minority and for pecuniary benefits which he alleged he had a reasonable expectation of receiving from his son after he would have reached the age of his majority.

Plaintiff further alleged that at the time of the accident Lewis Dye had lifted one end of a tie when Kelly, his coworker, raised the other end and shoved the tie in such a manner as to cause Lewis Dye's hand to be caught between one end of the tie and the side of the car and that the injury complained of was thus inflicted.

Plaintiff also alleged that the track was out of repair; that the train was moving at the rate of about seven miles per hour, and that the rocking of the car resulting from the movement of the train at that speed was a contributing cause of the injury. This act of Kelly, the uneven roadbed, and such movement of the train while the car was being unloaded, were charged as negligence and made the basis of plaintiff's suit.

The sixth paragraph of the court's charge to the jury reads as follows:

"You are instructed in this case that although you may find and believe from the evidence in this case that one Kelly was a coworker of the said Lewis H. Dye and performed the act as alleged in plaintiff's petition in unloading the tie, and produced the injury of a wounded hand, and believe that his act was negligence; or that the roadbed of the defendant at the point where the injury is alleged to have occurred was in an uneven and bad condition, and that in moving said train over said track at the time and at the point where said injury happened was negligence, still, if you further find and believe that after the said occurrence the said Lewis Dye, or the plaintiff C. H. Dye, failed to use ordinary care as to said bruised and wounded hand, if you believe the same was in such condition, and that the said Lewis Dye neglected the said hand in such condition and failed to exercise ordinary care to provide timely or suitable medicine or medical attention, and to such an extent as in either event, or by a combination of the same, was the proximate cause of his death, then you are instructed to find for the defendant, and so say by your verdict. And in this connection you are further charged that in order for the plaintiff to recover you must find and believe that the negligence of the defendant, if you find that it existed, was the proximate cause of the death of the said Lewis Dye, that is, the death was the natural and probable consequence of such negligence, and if you fail to find from the evidence that such negligence was such cause, you will find for the defendant, and the burden is upon the plaintiff for such issue."

Appellant contends that this charge was erroneous in that by it he was denied a recovery for loss of time by Lewis Dye during his illness resulting from the injury, and expenses incurred by plaintiff in treating the injured hand. As we construe plaintiff's petition his suit was to recover damages sustained by reason of the death of his son and nothing more. Another criticism upon the instruction above quoted is that by the latter portion thereof the burden of sustaining defendant's plea that Lewis Dye was guilty of negligence in caring for his wounded hand, was placed upon the plaintiff. There is no merit in this contention and it is overruled.

Defendant introduced testimony to the effect that the said John Kelly, Lewis Dye's coworker, was a good man and a careful man and did his work well. Plaintiff objected to this testimony on the ground that it was incompetent, and not material to any of the issues raised by the pleadings. The objection was overruled and this ruling is made the basis of appellant's eleventh assignment of error. The evident purpose of this testimony was to rebut evidence intro-

duced by plaintiff tending to show that Kelly shoved the tie in such a manner as to cause Lewis Dye's hand to be caught between the end of the tie and the side of the car, and as plaintiff did not charge that defendant had been guilty of negligence in the selection of Kelly as its servant the court erred in admitting it. Adams v. International & G. N. Ry., 122 S. W., 895; Ft. Worth & R. G. Ry. v. Finley, 50 Texas Civ. App., 291 (110 S. W., 531); Missouri, K. & T. Ry. v. Johnson, 92 Texas, 380.

The fourth paragraph of the court's charge reads: "You are charged that the burden of proof is upon the plaintiff to establish his case by a preponderance of the evidence, and if the plaintiff has failed, you will find for the defendant."

Defendant's eighth special instruction which the court gave is as follows:

"Although you may find and believe from the evidence that the hand of deceased was injured through the negligence of defendant, yet before you can find in favor of the plaintiff you must believe from a preponderance of the evidence that the death of the said Lewis H. Dye was the proximate result of such injury and not from some independent cause; and in this connection you are instructed that if you find from the evidence that the death of deceased was the result of some disease of the middle ear, or from mastoiditis, which was not caused by the injury to the hand, then you will find in favor of the defendant."

Appellant complains that for the court to tell the jury in each of these instructions and also in the latter portion of the sixth paragraph of the charge quoted above, that the burden was upon the plaintiff to prove by a preponderance of the evidence that defendant's negligence, if any, was the proximate cause of the death of Lewis Dye, was an undue emphasis of the issue and likely to be construed by the jury as an intimation of doubt by the court that the plaintiff had discharged the burden thus imposed. We think the criticism thus made is meritorious, and as this was a very material issue in the case and the evidence thereon conflicting and consisting largely of the opinions of expert witnesses, appellant's fourth assignment of error is sustained. No errors are assigned upon the court's charge other than those discussed above.

For the errors above noted the judgment of the trial court is reversed and the cause remanded for another trial.

Reversed and remanded.

GEISER MANUFACTURING COMPANY v. W. A. WATKINS ET AL.

Decided March 12, 1910.

Garnishment Bond.

A garnishment bond recited that whereas in a certain suit then pending the plaintiff "caused" a writ of garnishment to issue, etc. Held, that the use of the word "caused" did not necessarily or even fairly show that the issuance of the writ of garnishment had preceded the execution and filing of the bond, and it was error to sustain a motion to quash the bond and writ of garnishment on that ground.

Appeal from the County Court of Potter County. Tried below before Hon. W. M. Jeter.

Hugh L. Umphres and *J. T. Harrison*, for appellant.

Reeder, Graham & Williams and *Gustavus, Bowman & Jackson*, for appellee.

SPEER, ASSOCIATE JUSTICE.—This is a garnishment suit and ancillary to the Geiser Manufacturing Company v. N. A. Gray (this day decided), in which there was a judgment for the garnishees and the plaintiff has appealed. The question of error presented is as to the court's action in sustaining the garnishees' motion to quash the bond and writs of garnishment because the garnishment bond "shows upon its face that it was executed after writs of garnishment had been issued." The affidavit and bond for garnishment were written upon the same sheet of paper, the affidavit being subscribed on December 15, 1908, and the bond bearing date and being approved on the same day. The writ quashed bears date December 16, 1908, upon which the sheriff's return shows it came to his hand on that day and was executed on the following day.

The language of the bond, which the trial court held to be fatal, is as follows: "Whereas, in the cause of the Geiser Manufacturing Company v. N. A. Gray, suit now pending in the County Court of Potter County, Texas, the file No. of which is 801, plaintiff caused writs of garnishment to issue against W. A. Watkins and Frank Wilson," etc. The use in this connection of the word "caused" does not necessarily or even fairly show that the issuance of the writ of garnishment had preceded the execution and filing of the bond, but serves merely to identify the suit out of which the garnishment proceedings arose. In other words, it indicates that by this initial process plaintiff has this day caused the issuance of the garnishment writs. Wright v. Ragland, 18 Texas, 289. The date of the issuance of the writ of garnishment shows further that it did not precede, but followed the making of the bond.

For the error of the court in sustaining appellees' motion to quash the bond and writs of garnishment, the judgment is reversed and the cause remanded for another trial.

Reversed and remanded.

GEISER MANUFACTURING COMPANY v. N. A. GRAY.

Decided March 12, 1910.

Foreign Corporation—Permit to do Business—Pleading.

The statute concerning a permit to do business (Art. 745, Sayles Civ. Stats.) applies only to those foreign corporations "desiring to transact business in this State, or solicit business in this State, or establish a general or special office in this State," hence in a suit by a foreign corporation upon a promissory note, the petition would not be subject to exceptions on the ground that it contained no allegation that the plaintiff had complied with the requirements of said article unless it appear therefrom that the plaintiff corporation came within

the class forbidden to prosecute suits in the courts of this State without a permit.

Appeal from the County Court of Potter County. Tried below before Hon. W. M. Jeter.

Hugh L. Umphres and *J. T. Harrison,* for appellant.—Every private corporation, as such, has power to maintain and defend judicial proceedings in this State unless it is a foreign corporation desiring to transact or to solicit business in this State or to establish a general or special office in this State. Articles 651, 745, 746, Rev. Civ. Stats., 1895; Allen v. Tyson-Jones Buggy Co., 91 Texas, 22; Keating Imp. & M. Co. v. Favorite Carriage Co., 12 Texas Civ. App., 666; Brin v. Wachusetts Shirt Co., 43 S. W., 295; Chapman v. Hallwood Cash Reg. Co., 32 Texas Civ. App., 76.

The court erred in sustaining subdivision (a) of defendant's special exception to plaintiff's first amended original petition, because the allegations of said petition do not show that it is of that class of corporations contemplated by articles 745 and 746, Rev. Stats. of Texas. Bateman v. Western Star Milling Co., 1 Texas Civ. App., 90; Keating Imp. & M. Co. v. Favorite Carriage Co., 12 Texas Civ. App., 666; Brin v. Wachusetts Shirt Co., 43 S. W., 295; Chapman v. Hallwood Cash Reg. Co., 32 Texas Civ. App., 76.

Reeder, Graham & Williams, for appellee.—A foreign corporation instituting a suit or action in the courts of this State must show by its pleadings that it has a legal right to institute and prosecute such suit or action in the courts of this State. Bateman v. Western Star Milling Co., 1 Texas Civ. App., 90; Reed & Barton v. Walker, 2 Texas Civ. App., 92; Keating Imp. & Mfg. Co. v. Favorite Carriage Co., 12 Texas Civ. App., 666; Allen v. Tyson-Jones Buggy Co., 91 Texas, 22; Brin v. Wachusetts Shirt Co., 43 S. W., 295; Barnhard Bros. & Spindler v. Morrison, 87 S. W., 377; DeWitt v. Berger Mfg. Co., 81 S. W., 334; King v. Monitor Drill Co., 42 Texas Civ. App., 288; Norton v. Thomas & Sons, 93 S. W., 711; Norton v. Thomas & Sons, 99 Texas, 578; Lyons-Thomas Hardware Co. v. Reading Hardware Co., 21 S. W., 300; American Starch Co. v. Bateman, 22 S. W., 771; Miller v. Goodman, 91 Texas, 41; Taber v. Interstate Building & Loan Assn., 91 Texas, 92; Gale v. Finkelstein, 22 Texas Civ. App., 241.

SPEER, ASSOCIATE JUSTICE.—This suit was instituted by the Geiser Manufacturing Company and was to recover upon a promissory note executed by N. A. Gray, the defendant in the action. The defendant interposed a special exception to the sufficiency of the plaintiff's petition challenging the plaintiff's right to institute and maintain this suit without an allegation in its petition that it had complied with article 745, Sayles' Texas Civil Statutes, regulating the right of a foreign corporation to do business in this State. The trial court sustained this exception, and the plaintiff declining to amend, the court dismissed the cause and the plaintiff has appealed.

The allegations of the petition pertinent to the point thus raised are as follows: "The plaintiff is a corporation duly incorporated under and by virtue of the laws of the State of Pennsylvania, having its domicile and transacting its business in the city of Waynesboro, County of Franklin, State of Pennsylvania, and is now and was on all the days and dates herein mentioned doing business in said State of Pennsylvania, its business being the manufacture, sale and distribution of machinery at and within said city, county and State of its domicile, manufacturing the same for, and selling and distributing the same to, its customers throughout the United States of America in the manner aforesaid. That the defendant is an individual person and a nonresident of the State of Texas, being a resident of the State of Kentucky. . . . That heretofore, to wit, on the 10th day of January, 1908, for a valuable consideration the defendant made, executed and delivered to it his certain promissory note for the sum of six hundred and twenty-five dollars ($625), bearing date of the day and year last aforesaid, payable to the order of plaintiff," etc.

The article of the statute invoked reads: "Hereafter any corporation for pecuniary profit, except as hereinafter provided, organized or created under the laws of any other State or of any Territory of the United States, or of any municipality of such State or Territory, or of any foreign government, sovereignty or municipality, desiring to transact business in this State, or solicit business in this State, or establish a general or special office in this State, shall be and the same is hereby required to file with the Secretary of State a duly certified copy of its articles of incorporation, and thereupon the Secretary of State shall issue to such corporation a permit to transact business in this State," etc. The succeeding article declares that no such corporation can maintain any suit or action in any of the courts of this State, unless at the time such cause of action arose the corporation had filed its articles of incorporation as required by law.

There is nothing in the statute, however, which forbids a foreign corporation such privilege merely because it is a foreign corporation, but as will be seen from the above quotation the prohibition applies only to those foreign corporations "desiring to transact business in this State, or solicit business in this State, or establish a general or special office in this State;" and even here, if the business involved is interstate business, by judicial interpretation the article has no application. There is nothing in the petition of appellant to show that it comes within the class of foreign corporations thus forbidden to prosecute suits in the courts of this State. Allen v. Tyson-Jones Buggy Co., 91 Texas, 22; Brin v. Wachusetts Shirt Co., 43 S. W., 295; Keating Implement & Machine Co. v. Favorite Carriage Co., 12 Texas Civ. App., 666 (35 S. W., 417); King v. Monitor Drill Co., 42 Texas Civ. App., 288 (92 S. W., 1046); Norton v. W. H. Thomas & Sons Co., 93 S. W., 711.

For the error of the court in sustaining appellee's special exception and in dismissing appellant's petition, the judgment is reversed and the cause remanded for another trial.

Reversed and remanded.

WILLIAM E. BOND ET AL. v. HOMER GARRISON ET AL.

Decided March 14, 1910.

1.—Deed—Description of Land—Limitation.

A deed to land began, "State of Texas, Anderson County;" it was acknowledged for record before the county clerk of Anderson County and was duly recorded in the deed records of that county; there was at that time in that county a survey of the same name and area as that conveyed by the deed and bounded by adjacent surveys as set out in said deed, but the deed in question did not name the State or county in which the land was situated. Held, that the deed was properly admitted in evidence over an objection that it did not describe the land therein mentioned with sufficient certainty to identify it, and therefore could not form the basis for title by limitation.

2.—Limitation—Payment of Taxes—Name of Original Grantee.

Where land had been formerly located and surveyed by virtue of a certain certificate, and afterwards, upon forfeiture of said location, the same land was located upon, surveyed and patented by virtue of a different certificate, the payment of taxes upon said land thereafter in or by the name of the first certificate will not be sufficient to support the five years statute of limitation under the second location and certificate.

3.—Same—Continuity of Possession—Evidence.

One claiming title to land by limitation testified that the owner told him and his wife "to go there (upon the land) and have what we made, and after such a length of time he would make us a deed to the place. It was to be under his control. That is how I came to take charge of the place." Held to evidence an intention on the part of the occupant to hold possession for the owner and not for himself, and there was no break in the possession between the date of the occupancy and the date of the deed subsequently made by the owner to the occupant.

4.—Partition—Undivided Interest—Sale of Specific Tract.

Where the owner of land conveys first an undivided one-half of the same, and subsequently conveys a specific part of the tract, in a partition between the owner of the undivided interest and the owner of the specific part, the specific part will be awarded to the purchaser, he being in actual possession and enjoyment of the same and no injury resulting thereby to the owner of the undivided interest.

5.—Limitation—Boundaries.

In proving title to land by limitation under a deed, a general description or designation of the tract by the name by which it is commonly known must yield to a specific description by metes and bounds; and the limitation title will be confined to the specific description although the grantor had title by limitation to adjacent land included within the general designation or name of the tract.

6.—Appeal—Findings of Fact—Exceptions—Practice.

Since the passage of the law permitting trial judges to file their findings of fact and conclusions of law after the adjournment of the court for the term, a party appealing from the judgment is not required to make and enter of record exceptions to such findings. Exceptions to the judgment when rendered is sufficient to support objections to the conclusions filed by the court.

7.—Title—Evidence—Recitation in Deed.

The recitation in a deed that a part of the same tract of land had been conveyed by a prior owner to a third party, is not competent evidence of that fact.

Appeal from the District Court of Anderson County. Tried below before Hon. B. H. Gardner.

P. N. Springer, for appellants.—A registered deed which fails to give either the county or State in which the land is situated, and does not itself nor by reference to some other recorded instrument or permanent object furnish a description from which the location and lines of the land could be found and definitely fixed, is insufficient as a basis for title by limitation under either the five or ten years statutes. Young v. Trahan, 43 Texas Civ. App., 611; Day v. Needham, 2 Texas Civ. App., 680; Brokel v. McKechnie, 69 Texas, 33; Masterson v. Todd, 6 Texas Civ. App., 135; Kilpatrick v. Sisneros, 23 Texas, 113; Willis v. Burks, 7 Texas Civ. App., 239.

The plea of title by limitation, either under the five or ten years statute, is not sustained where, during any part of the time relied upon, the evidence shows the title was in the government and the land vacant. Creswell Ranch & Cattle Co. v. Waldstein, 28 S. W., 260; Montgomery v. Gunther, 81 Texas, 325, and cases there cited.

The payment of taxes under a void rendition and assessment is not such a payment as will support title under the five years statute of limitation. Dutton v. Thompson, 85 Texas, 115; Pitts v. Booth, 15 Texas, 455; Upshur v. Pace, 15 Texas, 532; Hull v. Woods, 14 Texas Civ. App., 593; Hoehn v. House, 31 S. W., 83; Henderson v. White, 69 Texas, 103; McCormick v. Edwards, 69 Texas, 106.

The payment of taxes on land for a certain year, the title to which was in the State on the 1st day of January of that year, is not such a payment as would support a plea of title under the five years statute of limitation. Same authorities; also Sayles' Rev. Stats., art. 5066.

Where a man instructed another to go upon a tract of land, telling him at the time that he could have what he made, and promising to make him a deed to it later, and such person under such instructions did take charge of such land and made valuable improvements thereon, and subsequently the man who had made the promise did execute and deliver to him a deed thereto, such promise showed a verbal gift of the land, and limitation ceased to run in favor of the giver, and commenced to run in favor of the other party from the date of such gift. McManus v. Matthews, 55 S. W., 589; Shepard v. Galveston, H. & H. Ry. Co., 2 Texas Civ. App., 539; Evans v. Gulf, C. & S. F. Ry. Co., 9 Texas Civ. App., 126.

Where a person by deed conveyed an undivided one-half interest in a certain tract of land, and afterwards by deed conveyed to another person a specific 100 acres out of the same tract, the court, in an action of trespass to try title, was not authorized to render judgment in favor of the second purchaser for the whole of the specific 100 acres, and force the first purchaser to accept his undivided interest out of another part of the tract.

The court erred in the fifth paragraph of his findings of fact in finding as a fact that by a deed of date September 26, 1895, Elbert Donnell conveyed to Coon Warren the same land conveyed to him by M. J. Cobb.

The court erred in the sixth paragraph of his conclusions of law in

deciding and holding as a matter of law that the defendants were entitled to the balance of that particular tract of land, and also the strip north of the Early survey and between the Foster and the Jacobs, south of a line from the northeast corner of the Jacobs 280 acres to the northeast corner of the Foster.

The court erred in overruling plaintiff's motion for a new trial, which motion was based upon the ground that the plaintiffs had, since the trial of the case, discovered new evidence.

On the trial plaintiffs read in evidence a deed from Coon Warren and wife, Mary Ann Warren, to B. P. & S. H. Adams, dated November 5, 1901, conveying to them an undivided one-half interest in the land involved in this suit, and which deed also contained the following recitation: "This is the same land deeded by M. J. Cobb to Elbert Donnell, and by said Elbert Donnell to Coon Warren on September 26, 1895, one-half of which 320 acres the said Coon Warren deeded to J. M. Emerson, of Anderson County, Texas."

After the evidence was all in and the witness, J. M. Emerson, had gone home and the argument begun, the defendant, Coon Warren, was again put upon the witness stand, and, over the objections of the plaintiffs, was allowed to testify that he had never executed a deed or any papers conveying to said J. M. Emerson any part of said land. That several days after the trial, to wit, about January 15, 1909, P. N. Springer, attorney for plaintiffs, met J. M. Emerson, and learned from him that Coon Warren had, in fact, executed to him a deed to said undivided one-half interest in said land, as recited in said deed from Coon Warren and wife to B. P. & S. H. Adams.

Gregg & Brown, for appellees.—It will be presumed that a deed which begins, "the State of Texas, County of Anderson," is acknowledged before an officer of Anderson County, Texas, is of record in the deed records of Anderson County, Texas, when offered in evidence is a conveyance of land located in Anderson County, Texas, and will be admissible in evidence over a general objection. Flanagan v. Boggess, 46 Texas, 335; Giddings v. Lea, 19 S. W., 682; Wilson v. Smith, 50 Texas, 367; Douthit v. Robison, 55 Texas, 73; Houston Oil Company v. Kimball, 114 S. W., 667.

Where the owner places his son-in-law in possession of land under a verbal promise to make a deed at some indefinite time in the future, he does not part with his title prior to execution of the promised deed. Rev. Stats., arts. 3342-3343 and 3344; Cantagrel v. Von Lupin, 58 Texas, 577; Harrison v. McMurray, 71 Texas, 122; Hirsch v. Patton, 49 Texas Civ. App., 499.

REESE, ASSOCIATE JUSTICE.—In this case William E. Bond and others, plaintiffs, sue in trespass to try title to recover of Homer Garrison and others, defendants, 600 acres out of a tract of 640 acres, being survey No. 3 granted to the International & Great Northern Railway Company. Bond died during the pendency of the suit, and John J. Phillips succeeded to all of his rights as plaintiff. Of the defendants, B. P. and S. H. Adams and J. M. Emmerson disclaimed as to all of the land sued for, and judgment was rendered against

them and in favor of plaintiffs on such disclaimers. Homer Garrison set up title to a specific tract of 100 acres and disclaimed as to the balance. The other defendants, Coon Warren and his wife, Mary Ann Warren, Tippie Hunter and her husband John Hunter, and Alice Sullivan and her husband Silas Sullivan, claimed jointly another specific part of the land, and disclaimed as to the balance. All of these defendants by written plea admitted that plaintiffs had title to the land sued for except in so far as such title should be defeated by their respective claims of title under the statute of limitation of five and ten years in themselves and those under whom they respectively claimed, which was specially pleaded.

The case was tried without a jury and judgment rendered for said defendant Homer Garrison for the land claimed by him, and for the other defendants not disclaiming for part of the land claimed by them, and for plaintiffs for the balance of the land sued for. From the judgment plaintiffs appeal. The court filed conclusions of fact and law which are in the record.

A brief statement of the respective titles of the parties is as follows:

On January 27, 1858, there was surveyed for J. Jacobs, by virtue of a bounty warrant issued in 1837, 320 acres of land in Anderson County, in two tracts, one of 280 acres and one of 40 acres. This case deals only with the former tract, which is described as follows:

"Beginning at the S. E. corner of the James Earley 160-acre survey on the north boundary line of the Jose Pineda three-league grant. Thence east, with the north line of said Pineda, 790 vrs. to the S. W. corner of the D. M. Thornton survey. Thence north with the west line of the D. M. Thornton 160-acre survey, at 950 vrs., past the N. W. corner, and at 2000 vrs. a stake. Thence west 790 vrs. to a stake. Thence south 1050 vrs. to the N. E. corner of the Early survey. Thence with the east line of the Early to the place of beginning, 2000 vrs. in all." Which field notes were recorded in the surveyor's records immediately after the survey, and sent to the General Land Office.

M. J. Cobb and her husband occupied this 280 acres from about 1863 to 1871. Cobb died, and his wife, Mrs. M. J. Cobb, by deed of date June 9, 1871, and recorded February 5, 1875, conveyed to Elbert Donnell a tract of land by the following description:

"The J. Jacob headright of three hundred and twenty acres, three hundred acres out of said tract and bounded as follows: Bounded on the south by twenty acres belonging to P. Pagitt; on the east by Mr. Morgans, the Thornton 160 acres and P. Pagitts, the Walter Clark headright; on the north by vacant land; on the west by Wm. Foster, deceased, and the W. H. Stanley, in all three hundred acres."

The trial court finds, and we adopt such finding as supported by the evidence, that the following is a definite description of the land conveyed by said deed:

"Beginning at the S. E. corner of the James Early 160-acre survey on the north line of the Jose Pineda three (3) league grant. Thence east with the north line of the Pineda to the S. E. corner of the Thornton 160-acre survey. Thence north with the west line of the Thornton and the west line of the Walter Clark survey, 2000 vrs. to

the N. E. corner of the J. Jacobs 280-acre survey. Thence S. W. to the N. E. corner of the Wm. Foster 80-acre survey. Thence south with the east line of the Wm. Foster survey to the S. E. corner of same on the north line of the James Early survey. Thence east with the north line of said Early survey to N. E. corner of same. Thence south with the east line of the said Early survey to the place of beginning."

Elbert Donnell immediately took possession of said tract of land, caused his deed to be recorded February 5, 1875, and lived on the land, cultivating, using and enjoying the same, claiming title to all of said land conveyed by said deed, by virtue of the deed, from June, 1871, and personally made crops on the land for the years 1872, '73, '74, '75, '76, '77, '78, '79, '80 and '81. He moved off the place the latter part of the year 1881 (the exact date not shown, but after he had made a crop for that year). Coon Warren took possession when Donnell moved off, and continued to hold possession, making crops each year, and holding possession for and under Elbert Donnell until the land was conveyed to him by Donnell, which was done on September 26, 1895, and afterwards, with the exception of one year, which was either 1903 or 1904. On September 26, 1895, Elbert Donnell executed to Coon Warren a deed to the land, together with another tract of 20 acres to the south of it, describing the land conveyed as follows:

"All of the following tracts or parcels of land situated in Anderson County, on the waters of Brushy Creek about 20 miles north from Palestine, viz.: 20 acres of the Jose Pineda 3-league headright, on the north boundary line of said headright, bounded on the north by the J. Jacobs headright, and on the south by Jack Tatum's land, it being the same land deeded to me by P. Pagitt. And 320 acres of the J. Jacobs headright (known as the Cobb land) which is bounded on the north by the I. & G. N. R. R. Co. headright, and on the east by the Thornton and I. & G. N. R. R. Co. headright, on the south by the Jose Pineda 3-league survey, and on the west by the J. Early and I. & G. N. R. R. Co. headright."

The second of the two above-described tracts is the land in controversy, but the description does not embrace all of the land conveyed by Cobb to Donnell. The description excludes that portion of the land conveyed by Cobb to Donnell lying west of and between the J. Jacobs 280-acre survey and the William Foster survey of 80 acres, which was occupied at the time of this conveyance by the I. & G. N. R. R. survey No. 3, the land conveyed by Donnell to Warren being bounded on the west by said survey and the Early survey.

Some time prior to 1875 the survey made for Jacobs became void, and was forfeited. This is admitted by appellees. On the 3d day of March, 1876, the International & Great Northern Railroad Company had all of the land embraced in the deed from M. J. Cobb to Elbert Donnell, together with other lands adjoining the same, in all 640 acres, surveyed under a valid certificate, the field notes of which were duly recorded in the surveyor's records of Anderson County and forwarded to the General Land Office, and patent issued thereon November 27,

1877. Appellants have regular chain of title to this land, including all of the land here in controversy, under this patent.

Elbert Donnell, during his occupancy, paid taxes on the land described in the deed from M. J. Cobb to him for the years 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879 and 1880. The taxes were paid on land in the J. Jacobs survey.

By deed of date November 5, 1901, Coon Warren and wife, Mary Ann Warren, executed to B. P. and S. H. Adams a deed to an undivided one-half interest in the said J. Jacobs 280 acres, describing it by metes and bounds. It is recited in the deed that Warren and wife had deeded one-half of said land to J. M. Emmerson. There was no evidence introduced as to this recited deed.

The following agreement was made by the parties and introduced in evidence:

"It is further agreed and admitted as a fact, that said plaintiffs have a regular, complete and good and sufficient chain of transfers of said land from said patentee up to themselves, and that they are now the owners of all of said lands except the 40 acres hereinafter mentioned, and are entitled to recover judgment therefor against all of the defendants in this suit by introducing this agreement in evidence instead of their chain of title.

"But this agreement is only intended to be an admission that said plaintiffs have made out a *prima facie* case by reading it in evidence, and is not intended nor shall it be construed to prevent said defendants or any of them from defeating such *prima facie* case by pleading and proving upon the trial hereof that they or some of them have acquired title to said land or some part thereof by conveyances or limitation. But the burden of proof shall be upon them."

There was no error in admitting in evidence over the objection of appellants the deed from Cobb to Donnell. It is true that it is not stated in the face of the deed that the land conveyed was in either the State of Texas or the County of Anderson, but the deed begins, "State of Texas, Anderson County," was acknowledged for record before the county clerk of that county, and was found duly recorded in the deed records of that county. There was at that time a J. Jacobs survey of 280 acres in that county, bounded by adjacent surveys as set out in this deed. There could be no question in anybody's mind that the land conveyed was in Anderson County. The objection was "because said deed did not describe the land therein mentioned with sufficient certainty to locate and identify it, and therefore could not form the basis for title by limitation." Whatever ambiguity might arise when it came to applying the description contained in the deed to the land on the ground, this could not be urged as an objection to the admission of the deed in evidence. That was a matter to be afterwards determined. The objection was properly overruled. (Douthit v. Robinson, 55 Texas, 73; Houston Oil Co. v. Kimball, 114 S. W., 667.)

The court found that this deed conveyed certain land, giving a particular description of the boundaries thereof with relation to the surrounding surveys and tracts of land. It was found, we think, upon

sufficient evidence, that these were the correct and more definite boundaries of the land embraced in the deed. There was no error in so finding. Nor was there any error in finding that Elbert Donnell moved off the land in the latter part of 1881. He testified that he made a crop on the land in 1881 and moved off that year. This justified the conclusion that he moved off the latter part of the year. The second assignment of error presenting these questions to the findings is overruled.

We sustain that part of the third assignment of error that the court erred in the conclusion of law that Elbert Donnell acquired title under the statute of limitation of five years. The statute did not begin to run against the present action until the location and survey under the I. & G. N. R. R. Co. certificate on March 3, 1876. We do not understand that the court held, or that appellees contend, otherwise. Donnell's possession was adverse from that date. His possession was sufficient to have matured his title under the five years statute in all other respects if he had shown payment of taxes as required. But we think the evidence fails in this particular. He paid the taxes from 1876 to 1880, both inclusive. He was in possession under recorded deed when the statute began to run, and so continued for full five years. No taxes were legally due until the year 1877, as the land belonged to the State from some date anterior to 1875 until March 3, 1876, and, under the statute, Donnell was only required to pay taxes due, "if any." He paid the taxes for 1877, 1878, 1879 and 1880. The five years' adverse possession was completed March 3, 1881, up to which time he remained in possession, cultivating, using and enjoying the land. This was, we think, sufficient as to the time for which taxes were paid. But he testified that he paid on the J. Jacobs survey. After the location of the I. & G. N. R. R. certificate, rendition and payment of taxes on any part of the land as the Jacobs survey was insufficient to support the statute. (Dutton v. Thompson, 85 Texas, 115.) Whether the land was exempt from taxation is not presented by the record or briefs.

This, however, does not require a reversal of the judgment, as the conclusion that Donnell had title under the ten years statute is amply supported by the evidence. He himself continued in adverse possession, cultivating the land and holding under duly registered deed from 1876 up to the latter part of 1881, and the evidence is sufficient to justify the conclusion that, under verbal agreement with Coon Warren, the latter immediately succeeded him and continued in such actual possession and cultivation, use and enjoyment until Donnell conveyed the land to him in 1895. Appellants contend that the evidence does not authorize the conclusion that Warren held possession for Donnell, but that, on the contrary, his possession was independent and for himself. Warren testified that Donnell told him "to go there and have what we made, and after such length of time he would make us a deed to the place. It was to be under his control. That is how I came to take charge of the place." This does not evidence a present gift to Warren, but only, at most, a promise at some time in the future to make such gift by regular deed, the land in the meantime to belong to and to be under the control of Donnell. This was

sufficient to preserve the continuity of claim and possession in Donnell until 1895, when he deeded the land to Warren, and this established his title by ten years limitation to the land described in the deed from Cobb to him.

As we have seen, Warren first conveyed to Adams in 1901 an undivided one-half interest in the land, and afterwards, in 1903, to Homer Garrison a specific 100 acres. Adams disclaimed, and appellants had judgment against him on this disclaimer. By the judgment of the court, Garrison was given judgment for his 100 acres, and appellants were given judgment out of the balance of the land for such undivided interest therein as would equal an undivided one-half of the whole, including the 100 acres adjudged to Garrison. This is assigned as error by appellants, who contend that Adams, having title to an undivided one-half of the whole, notwithstanding the subsequent conveyance of a specific 100 acres to Garrison, and appellants succeeding to that title upon Adams' disclaimer, they likewise are entitled to the same undivided one-half of the whole, and should not be required to take their interest in a part of the whole, excluding the 100 acres.

We confess there is much force in this contention. Upon the theory, which is supported by the authorities, that in a partition between Garrison and Adams there would be set apart to Garrison the 100 acres conveyed to him by their common vendor, of which he was then in actual possession and enjoyment, provided such could be done without detriment to the interest of Adams, we overrule appellants' contention on this point, the evidence not disclosing that such partition as was effected by the judgment was not fair, just and equitable to the parties, and without detriment to the interest of appellants. No claim is made, in fact, that it was not.

The findings of fact by the trial court that Elbert Donnell conveyed to Coon Warren the same land that was conveyed by M. J. Cobb to him is attacked by the fifth assignment of error as not being supported by the evidence. The assignment must be sustained. We have, in our conclusions of fact, given the description of the land conveyed by these respective deeds, from which it appears that the boundaries of the land conveyed by Cobb to Donnell go outside of the Jacobs 280 acres of land on the west to reach the William Foster survey. The description in the deed to Coon Warren by Donnell bounds the land conveyed, on the west, by the I. & G. N. R. R. Co. survey, which at the date of that conveyance covered all the land between the old Jacobs survey and the Foster, thus confining the land, in fact, to the lines of the original Jacobs survey. The reference in the deed to the land as "the Cobb land" must yield to this specific description. The present defendants being limited in their claim to the land conveyed by Donnell to Warren, both by their paper title and their limitation title based thereon, are not entitled to any part of the land sued for not embraced in this deed. In view of the agreement herein copied, appellees were not entitled to recover this land. The agreement limited their right to such of the land as they showed a title to in themselves or some of themselves. That the evidence disclosed title under the statute of limitations of ten years in Elbert Donnell to this part of the land, did not entitle appellces to it, such title not

having in any way passed to them to be used either defensively or offensively. They had admitted that it belonged to appellants unless they showed that it belonged to them or some of them, which did not include Elbert Donnell. No limitation title was shown in any of the defendants except through Donnell. As to this part of the land, which was adjudged to Coon Warren and wife, Tippie Hunter and John Hunter, and Alice Sullivan and Silas Sullivan, and separately described in the decree, the judgment will be reversed and here rendered for appellants. This question is presented by the fifth and eighth assignments of error.

The sixth and seventh assignments of error assail the findings that Tippie Hunter and Alice Sullivan were daughters of Coon Warren's first wife, who appears to have been a daughter of Elbert Donnell, and adjudging that they are entitled, along with Coon Warren and wife, to certain of the land. We can find no evidence in the record to authorize this finding or judgment. Appellees make no reply to the statement in appellants' brief that there is none, except to object to the consideration of any objection to the fact findings on the ground that no exceptions were made and entered of record to these findings in the trial court. It appears that the findings of fact and conclusions of law were filed after adjournment, under the provisions of a late statute. The statute makes no provision for the presentation of these conclusions to the parties. It would be absurd to require either party to except in advance to the preparation and filing of the conclusions. It has been held that exceptions to the judgment when rendered is sufficient to support objections to the conclusions filed by the court. (Continental Ins. Co. v. Milliken, 64 Texas, 46; Voight v. Mackle, 71 Texas, 78; Wilkens v. Burns, 25 S. W., 431; Temple v. Watkins Land Co., 81 S. W., 1188; Thompson v. State, 23 Texas Civ. App., 370.) The judgment of the court was duly excepted to, as was the order overruling the motion for new trial, and this was, we think, sufficient. There is no merit in the assignment of error to the action of the court in overruling the motion for a new trial on the ground of newly-discovered evidence. Appellant was offered ample time and opportunity to procure the testimony of the witness after he discovered its importance, of which he declined to avail himself. We think that, in fact, he should have proven by Emmerson the execution of the deed to him, which had been destroyed, if he proposed to avail himself of any advantage on this account. The mere recital of such conveyance in the deed to Adams was not original evidence of that fact.

The judgment in favor of Homer Garrison is affirmed, as is also the judgment in favor of the other appellees except as to the land lying west of the Jacobs survey and between that and the Foster survey, as hereinbefore referred to, as to which the judgment is reversed and here rendered for appellants. As to the other lands adjudged to all of the appellees except Garrison, the evidence does not show that any of the appellees except Coon Warren has any interest therein, but the judgment in favor of Hunter and Sullivan, jointly with Warren and wife, does not affect the rights of appellants and will not be disturbed.

The judgment will be affirmed in part and reversed and rendered in part, accordingly.

Affirmed in part; reversed and rendered in part.

Writ of error refused.

RIDGELL J. KELLER v. J. M. RADFORD GROCERY COMPANY.

Decided March 14, 1910.

1.—Judgment—Conclusive between Parties.

A mere judgment of nonsuit will not constitute a bar to a further proceeding by a plaintiff who has suffered it; but a judgment of a court upon the merits, having jurisdiction of the parties and of the subject matter, is conclusive in a collateral attack, however erroneous or irregular the judgment might be.

2.—Same—Absence of Plaintiff.

To a suit upon an open account for goods bought, the defendant pleaded minority at the time the goods were bought; the plaintiff failed to appear at the trial, but the court heard the defendant's evidence in support of his plea and rendered judgment in his favor and against the plaintiff. Held, that the judgment was a bar to any subsequent suit by the plaintiff or his assignee upon the account.

Appeal from the County Court of Mitchell County. Tried below before Hon. A. J. Coe.

L. W. Sandusky, for appellant.

Royall G. Smith, for appellee.—In order for a judgment to be a bar to a subsequent suit on the same cause of action, it must appear that said judgment was rendered in a trial upon the merits. Foster v. Wells, 4 Texas, 101; Hassell v. Nutt, 14 Texas, 260.

Where a plaintiff fails to appear in the Justice Court, the Justice has no power to proceed with a trial, but can only dismiss the action. Rev. Stats., article 1613; 20 Am. & Eng. Enc. Law (2d ed.), 242; Rains v. Herring, 68 Texas, 468.

CONNER, CHIEF JUSTICE.—This suit was instituted by appellee on July 27, 1908, to recover from appellant the sum of two hundred and ten dollars and sixty-one cents alleged to be due upon several itemized accounts assigned by different parties to the plaintiff. Among such accounts was one from C. M. Adams for the sum of thirty-six dollars and twenty cents, and one from the Colorado Mercantile Company for the sum of eighty dollars and fifty-five cents. To these appellant pleaded in bar two several judgments of the Justice Court of Precinct No. 1, Lamar County, Texas, rendered on the 15th day of June, 1908. One of the judgments was against the Colorado Mercantile Company and the other was against C. M. Adams, it appearing that the Colorado Mercantile Company and C. M. Adams had therein severally sued appellant to recover upon the accounts above specified.

The trial was before the court without a jury, and resulted in a

judgment for appellee in the sum of two hundred and twenty-two dollars and sixty-three cents, which included the Colorado Mercantile and C. M. Adams accounts.

Among other things, the trial court found the Colorado Mercantile Company and Adams accounts to be as above specified, and "that on June 15, 1908, in cause No. ——, then pending on the docket of the Justice Court in and for precinct No. One (1) in Lamar County, Texas, wherein the Colorado Mercantile Company was plaintiff and R. J. Keller defendant, and in cause No. ——, wherein Chas. M. Adams was plaintiff and R. J. Keller was defendant, which said first named suit was founded upon the same itemized account described in finding No. 2 above set forth, and which said second named suit was founded upon the same itemized account described in finding No. 3 above set forth, judgments were rendered in substantially the following language (the said judgments being identical except that in one the said Colorado Mercantile Co. was plaintiff and in the other the said Adams was plaintiff). 'On this day came on to be heard the above styled and numbered cause, wherein —— is plaintiff and R. J. Keller is defendant, and the plaintiff came not, either in person or by attorney, but the defendant came both in person and by attorney and announced ready for trial, and the court, no jury having been demanded, heard said cause upon matters of fact, as well as of law, and after having heard the pleadings, the evidence and the argument of counsel, finds that the law is with the defendant, and sustains his plea of minority, and finds that the law is with the defendant. It is therefore considered, ordered, adjudged and decreed by the court that the plaintiff, —— ——, take nothing by his suit, and that the defendant R. J. Keller go hence without day and recover of and from the plaintiff all costs in this behalf incurred, for all of which let execution issue.'"

The trial court concluded from the above finding as a matter of law that the judgments of the Justice Court of precinct No. 1, Lamar County, "were not on the merits of the said causes, and therefore constitute no bar to assertion of all or any part of plaintiff's cause of action herein sued on." In this we think the court erred. While it is well settled that a mere judgment of nonsuit will not constitute a bar to a further proceeding by a plaintiff who has suffered it (see 2 Black on Judgments, sec. 699; Hassell v. Nutt, 14 Texas, 260), it is equally well settled that a judgment of a court upon the merits having jurisdiction of the parties and of the subject matter, is conclusive in a collateral attack, however erroneous or irregular the judgment may be. See Williams v. Haynes, 77 Texas, 283, and authorities there cited; Abbot's Trial Evidence, page 826; 1 Greenleaf on Evidence, sec. 522; 2 Black on Judgments, sec. 500.

Upon the face of the judgments pleaded in this case it affirmatively appears that the court found in appellant's favor on the issue of minority presented in the Justice Court. The minority of the defendant in those suits was a plea in bar that went to the merits and if established forever precluded the plaintiffs from a recovery in the absence of allegations and proof that the goods had been obtained by fraudulent representations or were necessaries. See Carpenter v. Prig-

den, 40 Texas, 33. It is true the judgments recite that the several plaintiffs failed to appear, but such failure did not necessarily deprive the court of jurisdiction. By suing upon the accounts the plaintiffs invoked the jurisdiction of the court and entered a general appearance, and for aught that appears the accounts may have been verified and in the absence of sworn denial proof thereof not needed, and nothing in the express terms of the statute required the court to dismiss the cause. The statute provides: "The docket of cases to be tried by the justice shall be called regularly and the cases shall be tried when called unless the same should be continued or postponed to some later period in the term." Revised Statutes, article 1612. The next article provides that: "If the plaintiff shall fail to appear when the cause is called in its order for trial, the justice may, on motion of the defendant, dismiss the suit." Appellant insists that the term "may," as used in this article of the statute, is to be construed as "shall." If so, the statute indicates that it is to be "on motion of the defendant" which was not made in the cases under consideration. But whatever may be said to have been the duty of the justice upon the failure of the plaintiffs to appear, and however erroneous his action may have been in proceeding to a hearing upon the merits, his judgment was not void for want of jurisdiction. And not being so, the judgments can not be impeached or held as of no effect in this collateral proceeding.

We conclude that in so far as appellee recovered upon the Adams and Colorado Mercantile Company accounts, the judgment should be reversed and here rendered in appellant's favor, but that in all other respects the judgment must be affirmed. It will be further ordered that appellee pay the costs of appeal.

Affirmed in part and reversed and rendered in part.

SCOTTISH UNION & NATIONAL INSURANCE COMPANY v. J. T. WADE ET AL.

Decided March 16, 1910.

1.—Constitutional Law—Insurance.

The Act of March 27, 1903, Laws Twenty-Eighth Legislature, 94, 95, is not unconstitutional as depriving an insurance company of its property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

2.—Same.

The Act of March 27, 1903, Laws Twenty-Eighth Legislature, 94, 95, regulating contracts of insurance is not unconstitutional as depriving certain insurance companies of the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States, by an arbitrary classification of the companies subject to or exempted from the operation of the law. The classification is not that of companies, the Act applying equally to all, but of forms of contract, and furnishes on its face a sound reason for such classification.

3.—Insurance—Fire—Material Representations—Statute.

Chapter 5, article 3096aa, added to Title 58, Revised Civil Statutes, by the

Act of March 27, 1903, Laws Twenty-Eighth Legislature, 94, enacting that insurance contracts shall be not avoided for misrepresentations by insured not material to the risk, applies to policies of fire insurance as well as to life insurance.

4.—Same—Amendments to Statute—Numbering of Titles, Chapters and Articles.

The Act of May, 1897, Laws Twenty-Fifth Legislature, 197, relating to license of fire and marine insurance companies, while modifying certain provisions of the law governing them contained in Title 58, did not refer to such title or its chapters or articles, and can not be taken as adding chapter 5 to the same. The Act of March 27, 1903, adding chapter 5 embracing articles numbered 3096aa to 3096eee, created no confusion or uncertainty with regard to the numbering of chapters and articles.

5.—Case Distinguished.

Modern Order of Praetorians v. Hollmig, 100 Texas, 623, limited and distinguished.

6.—Same.

Gross v. Colonial Ass. Co., 56 Texas Civ. App., 627, distinguished from this case as involving a promissory warranty, not misrepresenting an existing fact.

Appeal from the District Court of Brown County. Tried below before Hon. Jno. W. Goodwin.

Jenkins & McCartney and *Crane, Seay & Crane,* for appellant.—Articles 3096aa, 3096bb, 3096cc, 3096dd, 3096ee, 3096eee, Revised Civil Statutes of Texas are unconstitutional and void in that said Act is in contravention of and violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States and therefore void, for the reason that it denies the appellant the equal protection of the law. Connolly v. Union Sewer Pipe Co., 184 U. S., 540; Gulf, C. & S. F. Ry. Co. v. Ellis, 165 U. S., 154; Cotting v. Kansas City S. Y., 183 U. S., 79; Northwestern L. Ins. Co. v. Riggs, 203 U. S., 243; Orient Ins. Co. v. Daggs, 172 U. S., 557.

Harrison & Wayman for appellees.

KEY, CHIEF JUSTICE.—J. T. Wade and his wife instituted this suit against the Scottish Union and National Insurance Company, seeking to recover upon a $2,000 policy of insurance on a gin house, machinery, etc.

The main defense relied on in the court below and urged in this court is a representation or statement in the application for the policy to the effect that the total concurrent insurance on the property was limited to $2,500, including the policy therein applied for; that the statement referred to constituted a warranty, and that plaintiffs at the time of making said application, and at the time the property was destroyed by fire had other insurance thereon to the amount of $3,000.

Replying to that part of the defendant's answer, the plaintiffs alleged that the defendant was estopped because of the fact that its agent who solicited and induced the plaintiffs to take out the policy in suit was informed of all the facts and had actual knowledge of the preexisting insurance, and that the plaintiff J. T. Wade signed the application in blank upon an agreement with the agent that he would

thereafter fill out the blanks in accordance with the facts as disclosed to him by J. T. Wade, and that he fraudulently or negligently failed to do so, and improperly filled the blank in reference to concurrent insurance as it now appears in the application. It was also alleged that the plaintiffs had not read or examined the policy before the fire, and did not know of the improper restriction therein concerning concurrent insurance; and, on account of their ignorance concerning such matters, would not have understood the policy had they read it. And the plaintiffs further alleged, as part of the plea of estoppel, that the defendant received and appropriated the premiums which the plaintiff paid for the policy.

In a supplemental answer the defendants asserted that, by reason of the acceptance of the policy, the plaintiffs were estopped from denying the correctness of any of its stipulations.

There was a jury trial which resulted in a judgment for the plaintiffs, and the defendant has appealed.

Learned counsel for appellant have filed an elaborate brief, presenting numerous assignments of error. This court has neither time nor inclination to discuss in detail all the questions presented; and, except the questions hereafter discussed, we content ourselves with the statement that all the other questions have been carefully considered in the consultation room, and we have reached the conclusion that the plaintiffs' pleadings are not subject to any of the objections urged against them; that the trial court committed no error in rulings upon the admissibility of testimony, and that the charge given to the jury is not subject to the criticisms urged against it, and that no error was committed in refusing instructions requested by the defendant.

The Twenty-Eighth Legislature passed a law providing, in substance, that any provision in any contract or policy of insurance issued or contracted for in this State, which provides that the answers or statements made in the application for such contract, or in the contract of insurance, if untrue or false shall render the contract or policy void or voidable, shall be of no effect and shall not constitute any defense to any suit brought upon such contract, unless it be shown that the matter or thing misrepresented was material to the risk or actually contributed to the contingency or event on which the policy became due and payable. That statute contains this provision: "The provisions of this Act shall not apply to policies of life insurance in which there is a clause making such policy indisputable after two years or less, provided premiums are duly paid; provided further, that no defense based upon misrepresentation made in the application for, or in obtaining or securing any contract of insurance upon the life of any person being or residing in this State shall be valid or enforcible in any suit brought upon such contract two years or more after the date of its issuance, where premiums due on such contract for the said term of two years have been paid to and received by the company issuing such contract, without notice to the assured by the company so issuing such contract of its intention to rescind the same on account of misrepresentation so made, unless it shall be shown on the trial that such misrepresentation was material to the risk and intentionally made."

The court below applied that statute and instructed the jury that the application for the policy sued on contained an untrue statement as to the amount of preexisting insurance. The jury were further instructed that the defendant's liability depended, among other things, upon the materiality of the statement referred to. Counsel for appellant present the contention that the proviso quoted in the Act of the Twenty-Eighth Legislature places that legislation in contravention of section 1 of the Fourteenth Amendment to the Constitution of the United States. One contention is that the statute deprives appellant of its property without due process of law, but that contention is without merit, nor is it urgently insisted upon.

The chief contention, and the one urged with much insistence and with some force, is that the statute denies to appellant, and all others similarly situated, the equal protection of the law as guaranteed by the Federal Constitution. The contention is that the proviso quoted creates an arbitrary and unreasonable classification of insurance companies, and thereby relieves one class from the provisions of the statute to which the other class is subjected. Counsel for appellant concede, as the courts have repeatedly held, that legislation may classify insurance companies and make laws governing fire insurance which do not apply to and govern life insurance. But the contention is that the statute under consideration has not observed any such distinction or made any such classification, but that it has arbitrarily created a class consisting of insurance companies writing a particular kind of contract, and exempted all such companies from the operation of the statute. If that construction be correct there is much force in the contention urged. But the fallacy which underlies the contention so earnestly presented is an erroneous construction placed upon the statute. The proviso referred to does not exempt any class of insurance companies from the operation of the statute, it exempts all insurance companies when sought to be held liable upon a life insurance contract containing a clause making the policy indisputable after two years or less provided premiums are duly paid. Any company which chooses to make a life insurance contract containing such stipulation as to noncontestability is, as to that particular contract, but not otherwise, exempt from the operation of the statute. The statute does not classify companies, but classifies contracts, and furnishes on its face sound reason for such classification. This relieves the statute from any criticism based upon the assumption that it creates an unreasonable and arbitrary classification of insurance companies; and we therefore hold that it does not contravene the provision of the Federal Constitution invoked by appellant.

It is further insisted that the Act of the Twenty-Eighth Legislature was intended to apply to life insurance only. The Revised Statutes of this State, adopted by the Legislature in 1895, are subdivided into titles, chapters and articles. In some instances more than one article is given the same number, and these are distinguished by adding after the number one or more letters of the alphabet. All the laws relating to the subject of insurance are placed under title 58, and they comprise four chapters. Chapter 4 contains articles 3096a, 3096b, 3096c, 3096d, 3096e, and so on down to and including 3096y. The title of

that chapter is "Home, Life and Accident Insurance Companies," and it may be conceded that everything contained in that chapter relates and is limited to such insurance and has no application to any other insurance. The caption of the Act of the Twenty-Eighth Legislature is: "An Act to Amend Article 58, Revised Civil Statutes, relating to the subject of insurance, by adding thereto Chapter 5, embracing articles 3096aa, 3096bb, 3096cc, 3096dd, 3096ee, and 3096eee, etc." The first section declares "That title 58, Revised Civil Statutes, be and the same hereby is amended by adding thereto chapter 5, embracing articles 3096aa, 3096bb, 3096cc, 3096dd, 3096ee and 3096eee, as follows, to wit:" The statute then proceeds to enact the several articles, giving to each one the number and letters above stated. The first article reads as follows:

"Chapter 5, article 3096aa. That any provision in any contract or policy of insurance issued or contracted for in this State, which provides that the answers or statements made in the application for such contract, or in the contract of insurance, if untrue or false, shall render the contract or policy void or voidable, shall be of no effect and shall not constitute any defense to any suit brought upon such contract, unless it be shown upon trial thereof that the matter or thing misrepresented was material to the risk or actually contributed to the contingency or event on which said policy became due and payable, and whether it was material and so contributed in any case, shall be a question of fact to be determined by the court or jury trying such case."

This language is very broad, and indicates that it was the intention of the Legislature that it should cover every kind and class of insurance; and there is nothing in the entire Act, except the proviso contained in article 3096eee, which has already been quoted and which has no application to fire insurance, tending to limit its scope. However, counsel for appellant contend that the entire Act should be limited to life and accident insurance contracts in order to preserve harmony and avoid confusion.

It is stated in appellant's written argument that in 1903, when the Twenty-Eighth Legislature enacted the statute under consideration, there was on the statute books a chapter 5 of title 58, consisting of articles 3096aa, 3096bb and 3096cc passed by the Twenty-Fifth Legislature in 1897, and relating to the subject of licenses of insurance companies and their examination by the Insurance Commissioner. A law was passed by the Twenty-fifth Legislature relating to the subject referred to, but neither in its title nor its body does it mention title 58, nor does it specify any chapter or article by number or otherwise. While its effect may be to modify certain articles of the Revised Statutes relating to the subject of insurance, it does not purport to be chapter 5, nor does it purport to contain article 3096aa, or any other article (Gen. Laws, 1897, p. 197). Hence we conclude that, in treating the Act of the Twenty-Eighth Legislature as adding an additional chapter to title 58, relating to the general subject of insurance, no confusion will result, as there will not be, as contended, a duplication of numbers of either chapter or articles.

We are reminded of the fact that our Supreme Court in deciding

the case of Modern Order of Practorians v. Hollmig, 100 Texas, 623, 103 S. W., 476, stated that the statute under consideration was added to chapter 4, of title 58. It was added to that chapter in the sense that it follows immediately after it, and constitutes an additional chapter; but it is not believed that the Supreme Court intended to hold that it was merely a part of chapter 4, and limited to the character of insurance dealt with in that chapter. In fact, that question was not then before the court, and any expression upon the subject would be obiter dictum. We are satisfied that it was the intention of the Twenty-Eighth Legislature to add to title 58 an additional chapter relating to fire, as well as life insurance. It is true that the Supreme Court, in Modern Order of Prætorians v. Hollmig, *supra,* held that the Act of the Twenty-Eighth Legislature does not apply to fraternal beneficiary associations; but that decision was not based so much upon an interpretation of the language of that Act, as upon the language of a prior Act which undertook to declare how future legislation should be written to make it applicable to such associations; and that decision is undoubtedly correct if (as seems to have been assumed by the court) prior legislation may prescribe the language necessary to be used in all subsequent legislation in order to accomplish a particular purpose. The point there decided has no application to this case.

We are also mindful of the fact that in Gross v. Colonial Assurance Co., 56 Texas Civ. App., 627, 121 S. W., 517, the Court of Civil Appeals for the First District held that the false statement relied on in that case as a defense constituted a promissory warranty, and therefore was not within the purview of the Act of the Twenty-Eighth Legislature. A promissory warranty has reference to something to be done or omitted in the future, and does not include that which exists at the time or relates to the past. A promissory warranty must embody an agreement to do or not to do something in the future. In the case at bar, no additional insurance was procured after the policy in suit was issued, and the false representation or statement, if any was made, related to conditions existing at the time, and therefore it did not constitute a promissory warranty.

No reversible error has been shown and the judgment is affirmed.

Affirmed.

Associate Justice Jenkins did not sit in this case.

Writ of error refused.

GALVESTON, HOUSTON & HENDERSON RAILROAD COMPANY v. PENNEFATHER & CO.

Decided March 16, 1910.

1.—Railways—Connecting Lines—Partnership—Contract—Joint Operation.

A contract between connecting lines of railway for the transportation of the traffic and operation of the trains of one over the line of the other considered and held, neither to constitute a partnership, nor such joint operation as would render the connecting line liable for a loss of cotton shipped on contract with and from a station on the line of the other, in the absence of proof that it reached or was carried over such connecting line.

2.—Same.

A contract between connecting railways held to be, in effect, a trackage arrangement for the operation of the trains of one over the track of the other for a compensation based on the cost of maintenance and service and proportionment to the total "wheel miles" of the respective companies over the track, which would not render the owning company liable upon contracts of the other for through transportation of freight originating on the other's lines carried upon its contract and transported by it over the connecting track in its own trains. But if such contract made the two roads partners or joint carriers of goods, it was only as to property reaching and carried over the track in question; and where the shipment was not shown to be billed or routed over such connection or to have actually reached or been carried over it, or the loss to have occurred thereon, such connecting road was not liable.

3.—Action Against Receiver.

An action against a receiver of a railway upon a cause of action not growing out of his acts, but originating in transactions of the company prior to his appointment, can only be brought by leave of the court in which the receivership is pending.

Appeal from the District Court of McLennan County. Tried below before Hon. Marshall Surratt.

Baker, Botts, Parker & Garwood and *O. L. Stribbling,* for appellant.—The agreement of 1895 between the International Company and the Galveston Company as acted upon by the parties thereto in the operation of their respective trains over appellant's track from Houston to Galveston, conferred upon the International Company a license to use the tracks of the Galveston Company between Houston and Galveston for the purpose of hauling its own passengers, freight and cars between those points, and to points on its own line, and nothing more. Texas & N. O. R. Co. v. Berry, 31 Texas Civ. App., 3; International & G. N. R. Co. v. Foltz, 3 Texas Civ. App., 644; Gulf, C. & S. F. Ry. Co. v. Baird, 75 Texas, 256; Houston & T. C. Ry. Co. v. Williams, 31 S. W., 556; Houston & T. C. Ry. Co. v. Groves, 48 Texas Civ. App., 45; Gulf, C. & S. F. Ry. Co. v. Edloff, 89 Texas, 454; Texas Central Ry. Co. v. Pool, 52 Texas Civ. App., 307; Chicago, R. I. & T. Ry. Co. v. Halsell, 35 Texas Civ. App., 126; Houston & T. C. Ry. Co. v. McFadden, 91 Texas, 203; Gulf, C. & S. F. Ry. Co. v. Miller, 98 Texas, 270; Jolly v. Missouri, K. & T. R. Co., 38 Texas Civ. App., 332; St. Louis, A. & T. Ry. Co. v. Neel, 19 S. W., 964; Moorshead v. United Rys. Co., 96 S. W., 266; 100 S. W., 612; State v. Trinity & B. V. Ry. Co., 56 Texas Civ. App., 424; Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 163 U. S., 564; Thompson on Negligence, secs. 1955, 3383; 30 Cyc., 349; 31 Cyc., 1189-1195-1197.

Jno. W. Davis, for appellees.—Receivers in this State can be sued without leave of court. Rev. Stats., art. 1483. The Act of Congress does not limit the right to sue a receiver without leave of court to cases where the cause of action arose from the conduct of the receiver himself or his agents; with respect to the question of liability, the receiver stands in place of the corporation itself. McNulta v. Lochridge, 141 U. S., 329-331. Receivers are proper parties to suits

against a railroad for which he is receiver. Howe v. Harding, 76 Texas, 17; San Antonio & A. P. Ry. Co. v. Ruby, 80 Texas, 172; Frankle v. Jackson, 30 Fed., 398; Dallas Cons'd Trac. Co. v. Hurley, 10 Texas Civ. App., 246; International & G. N. R. Co. v. Ormond, 57 Texas Civ. App., 79.

The International & G. N. and the Galveston, H. & H. Railway Companies by their contract of 1895, became one system of railways from interior points in Texas to the Gulf, and were so held out to the public, and whenever a contract was entered into in the interior for transportation of freight to the ship side or beyond, it was the contract of both railroads to the extent that when loss occurred on either road both were liable to the owner. 6 Am. & Eng. Ency., 655; Illinois Cent. Ry. Co. v. Jones, 39 So., 493; Alabama & V. Ry. Co. v. Lamkin, 30 So., 47; Swift v. Pacific Mail Steamship Co., 106 N. Y., 206; Rocky Mt. Mills v. Wilmington & W. R. Co., 25 S. E., 854; International & G. N. R. Co. v. Anderson, 3 Texas Civ. App., 8; Missouri, K. & T. Ry. Co. v. Wells, 24 Texas Civ. App., 304; Galveston, H. & S. A. Ry. Co. v. Johnson, 37 S. W., 243.

Under the contract of 1895 the two carrier defendants in this suit conferred on each an agency for the other in the transportation of traffic to and from interior points in Texas, and by so doing made themselves bound to any shipper for any loss that may have occurred on either railroad. Gulf, C. & S. F. Ry. Co. v. Baird, 75 Texas, 256; Ft. Worth & D. C. Ry. Co. v. Williams, 77 Texas, 125.

The burden rested on the G. H. & H. Railway to show that none of the lost cotton was lost on its road, and if it be held that the evidence does not show where the cotton was lost, both defendants are liable therefor, even if the G. H. & H. Railway should be held to be only connecting carrier. Same authorities under preceding propositions, also International & G. N. R. Co. v. Foltz, 3 Texas Civ. App., 644.

RICE, ASSOCIATE JUSTICE.—Appellees, a copartnership of Liverpool, England, instituted this suit against the International & Great Northern Railroad Company, and T. J. Freeman, the receiver of said company, and the Galveston, Houston & Henderson Railroad Company, to recover the value of 34 bales of cotton, being parts of two shipments, alleged to have been delivered by plaintiffs, through their agents, to the International & Great Northern Railroad Company at Italy, Texas, to be shipped by it through the port of Galveston, Texas, to them at Liverpool, and for which two shipments of cotton said first named company executed its two foreign bills of lading to plaintiffs' agent, Edward L. Cox, one of which was for 100 bales and the other for 200 bales; that all of said cotton except 34 bales was delivered to plaintiffs in Liverpool, which 34 bales it was alleged was converted between April and August, 1907, by said two railroad companies at Galveston, Texas. It was further alleged that said two companies were partners in said shipment, agents for each other, and were operating under a joint traffic arrangement; and it was likewise alleged that T. J. Freeman was appointed receiver of said I. & G. N. Railroad Company some time in January or February, 1908.

Appellant answered, first, by plea of privilege to be sued in Galveston, the county of its residence; also by general and special exceptions, and denied under oath the partnership, or that the two railroad companies were agents for each other with respect to said shipment; and further alleged that none of the cotton described in plaintiff's petition, alleged to have been converted, ever came into the possession of appellant or was in any way handled or controlled by it or any of its agents in its transportation from Italy, Texas, to Galveston, Texas, but that said cotton was, at all times, under the control and management of the International & Great Northern Railroad Company, and that appellant was in no way interested in said shipment or responsible therefor.

Thomas J. Freeman, receiver of the International & Great Northern Railroad Company, answered by special exception and a plea wherein it was alleged that he was appointed receiver of the property of said company by the Circuit Court of the United States for the Northern District of Texas subsequent to the accrual of the cause of action sued upon, and that plaintiffs had not procured from said court in said cause in which he was appointed receiver, any leave or permit to bring this suit against him as such receiver on the cause of action asserted. And further alleged that plaintiffs' cause of action, if any, did not grow out of any act or transaction of his in carrying on the business connected with the property of said company as its receiver.

Upon trial before the court without a jury appellant's plea of privilege was overruled and judgment was rendered in favor of plaintiffs for $3,038.28, against both railroad companies, and said suit as to the receiver, Thomas J. Freeman, was dismissed with his costs. Appellant alone prosecutes this appeal.

We pretermit any discussion of the questions raised in appellant's first assignment, wherein it urges that the court erred in overruling its plea of privilege to be sued in Galveston County because, in view of the disposition we make of the case, we regard it unnecessary to do so.

It is insisted by appellant in its second assignment that the court erred in holding that the contract between appellant and the I. & G. N. Railroad Co., executed on the 19th of November, 1895, as set out in the court's findings of fact, constituted a joint traffic arrangement or agreement between the parties thereto, and rendered appellant jointly liable to appellees for the value of the cotton sued for herein. The contract referred to is voluminous, and we will only insert the substance thereof, as found by the court, which is as follows:

"ARTICLE I.

"The Galveston Company hereby agrees, during the period of this agreement, to receive at all reasonable times, and to draw and transport over its road between the cities of Houston and Galveston, without delay or discrimination, all passengers, merchandise, tonnage and cars, loaded or empty, of the said International Company, and which shall be tendered by the said International Company to the said Galveston Company, either at the city of Galveston or at the city of

Houston, or at any of the intermediate points between said cities on the line of road of the Galveston Company; and the said Galveston Company shall, upon demand of the said International Company, and when required by said International Company, transport and draw over its said railroad the cars, empty or loaded, of said International Company in separate trains. The said Galveston Company further agrees to receive and deliver such passengers, freight, merchandise, tonnage and cars of the said International Company at the stations, depots, sidetracks, yards and freight houses of the said Galveston Company, and keep and care for same on its main tracks or side tracks and in its yards and at its terminals in the cities of Galveston and Houston, and at intermediate stations between said cities, in the same way and to the same extent that it receives and delivers, keeps and cares for, or should receive and deliver, keep and care for its own cars and the passengers, freight, merchandise and tonnage moved in its own cars.

"ARTICLE II.

"For and in consideration of the receiving, delivering, keeping, caring for and transporting of the passengers, merchandise, tonnage and cars of the International Company by the Galveston Company, as provided for in Article I hereof, the said International Company agrees to pay the said Galveston Company as follows:

"Section 1. As fixed compensation for the services to be rendered by the Galveston Company and for use of its road and appurtenant properties, as herein provided, the International Company shall pay the Galveston Company $62,000 per annum, $12,000 in equal monthly installments and the balance to be paid on the interest of the first mortgage bonds of the Galveston Company.

"Sec. 2. The International Company shall further pay the actual cost of the Galveston Company for train services in hauling and transporting the separate trains of the International Company under this agreement, including interest at the rate of six percent per annum on the cost of the Galveston Company's engines used in such transportation, also the cost of repairs on such engines made necessary by use in such service.

"Sec. 3. The International Company further agrees to pay to the Galveston Company what shall be known as 'Proportional charge for maintenance and operation of freight terminals at Galveston & Houston,' and the sums to be paid under this head by the International Company shall be ascertained and determined in the following manner (which is based on the tonnage handled):

"Sec. 4. The International Company further agrees to pay to the Galveston Company what shall be known as 'proportional charge for maintenance and operation of the Galveston Railroad,' including bridges, side and passing tracks and switches, including taxes, cost of insurance, renewals and repairs. It excepts the expense of operating trains of the Galveston Company not doing any business for the International Company—the amount to be paid determined on the wheelage basis."

Sec. 5. Provides that the Galveston Company shall maintain and

operate its railway and appurtenant properties covered by the agreement, including freight terminals and freight houses, fully equal to the standard of maintenance and operation of the first-class railways in the State of Texas.

ARTICLE III.

Provides for a system of accounting in order to determine the amount due by the International Company to the Galveston Company under Article II.

ARTICLE IV.

Provides for the termination of the agreement in the event of a failure of either company to perform the obligations assumed in the contract.

ARTICLE V.

Provides that "The separate trains of the International Company provided for herein may be drawn by its own engines and operated by its own train crews and at its own expense while on the Galveston Railroad, but they are, in entering upon and leaving, and while on said joint track, to be subject in their movements to the control and orders of the Galveston Company."

ARTICLE VI.

Defines local traffic and reserves all such local traffic to the Galveston Company originating on the Galveston Railroad; provides that the Galveston Company may require the International Company to carry on its trains any part of the local traffic of the Galveston Company; also recites the execution of a similar agreement with the Missouri, Kansas & Texas Railway Company of Texas.

ARTICLE VII.

Provides that in cases of injury, loss or damage arising in the use of the freight terminals of the Galveston Company at Houston and Galveston, under this agreement, the cost and expense thereof shall be paid by the Galveston Company and charged to the maintenance and operation of freight terminals at Galveston and Houston; also provides for payment of loss or damage growing out of the handling of freight, and providing that all losses, injuries and damages arising exclusively through the fault of the International Company while operating its own trains, shall be borne by the International Company; also a similar provision with reference to the Galveston Company.

ARTICLE VIII.

The International Company reserves the right, at its own expense, to appoint its own agent and provide for sale of tickets and doing the billing relating to its own business; also joint agents, when used,

shall be paid by the Galveston Company, and charged to the operating account.

ARTICLE IX.

Provides for arbitration.

ARTICLE X.

Provides that nothing contained in the contract shall preclude the Galveston Company from hauling or transporting passengers, tonnage, etc., of other railroad companies upon such terms as may be lawfully agreed upon. The contract is for the term of forty years.

The above contract was submitted to and approved by the Railroad Commission of Texas.

The findings of fact by the court, supplemented by the evidence as set forth in the statement of facts, wholly failed to show that any of the cotton lost was ever shipped over the Galveston, Houston & Henderson Railroad; and it is not affirmatively shown that any of said shipment was carried over said road. The books of the I. & G. N. Railroad Co. at Galveston show that all the cotton, except the missing cotton, was received in Galveston by the I. & G. N. Railroad Company, and transferred to the steamship company. And, while it might be inferred from the evidence that that part of the cotton so received in Galveston reached there in the cars of the I. & G. N. Company by way of the Galveston, Houston & Henderson road, still, there is no positive evidence of that fact; nor does the contract require all shipments on the I. & G. N. to be carried over its line, and it is possible that this shipment may have reached Galveston on some other road. In fact, there is nothing in the record going to show what became of the thirty-four missing bales after their delivery to the I. & G. N. Railroad Company at Italy, Texas. The two bills of lading in this case were executed by the I. & G. N. Railroad Company, but no allusion was made in either to the Galveston, Houston & Henderson Railroad Company, nor was said shipment routed over the latter road. From aught that appears in the record, we have as much right to assume that the cotton was lost between Italy and Houston on the line of the I. & G. N., as we have to say that it was lost between Houston and Galveston, on the line of the Galveston, Houston & Henderson Railway.

We are not prepared to agree with counsel for appellees that the contract between the two railway companies, above set out, constitute them a partnership, nor render them jointly liable as the agents of each other so far as this control is concerned, but that the same was more in the nature of a trackage arrangement, by which the I. & G. N. obtained the right and privilege of running its cars into Galveston over the road of the Galveston, Houston & Henderson Company; and this view is emphasized by the testimony of General Manager Hill with reference to the manner of conducting business between said companies. He testified: "It is a fact that the I. & G. N. Company uses the G., H. & H. Railroad from Houston to Galveston, and has done

so for the last two or three years for the purpose of transporting all the freight and passengers carried by it from interior points in Texas, under the agreement referred to." But he further testified that the three lines mentioned do not do business together, but do use the same facilities under the agreement referred to; that the I. & G. N. and the M., K. & T. run their own engines and cars over the the G., H. & H. Railroad Company's tracks, and the amount paid by each is the percentage of the total cost of maintaining said road as its total wheel miles monthly bears to the total wheel miles. (See in this connection: Houston & T. C. R. R. Co. v. McFaddin, 91 Texas, 194; St. Louis A. & T. Co. v. Neell, 19 S. W., 963; Union Pac. R. R. Co. v. Chicago, R. I. & Pac. Ry. Co., 163 U. S., 564; Alford v. Chicago, R. I. & P. Railway, 3 Interstate Commerce R., 519; State v. Trinity & B. V. Ry., 56 Texas Civ. App., 424, 120 S. W., 1172, and authorities there cited.) But if it were conceded that the contract made them partners, then it is evident that it could not possibly constitute a partnership, except as between them for the transportation of traffic over the Galveston, Houston & Henderson Railway, and to render them responsible, as partners, for the loss of any freight, certainly the loss must be shown to have occurred, even under the contract, on the line of the Galveston, Houston & Henderson Railroad, or after the shipment had gone into its possession or control; for, if the cotton was lost before its arrival at Houston, certainly the latter line could not be held responsible for it, for the very reason that the supposed partnership as above set forth could not possibly be held to embrace or cover traffic which had not come into its control or been transported over its line. There is no evidence in the record showing or tending to show how this cotton was loaded for shipment at Italy, whether in one or more cars, or whether the entire 300 bales was in fact loaded on the cars; and so far as anything appears in the record, the missing cotton may never have started over the line of the I. & G. N., and may have been lost at Italy; in which event it certainly could not be contended that the Galveston, Houston & Henderson Railroad Company could be held responsible for it, even if the contract between the companies constituted them partners in the transportation of traffic over the latter line. It is true that the bills of lading issued by the I. & G. N. covered the entire 300 bales, but there is no presumption from the issuance thereof that the cotton had in fact been loaded at the time they were issued. So that if we were to hold that the contract between the two railway companies constituted them partners, as contended by appellee, still we think they would be partners only as to traffic handled by virtue of said contract over the line of the Galveston, Houston & Henderson Railroad Company; and unless the proof in this case had shown (which it wholly fails to do) that the missing cotton was ever received or hauled over the line of the latter company, it could not be held responsible for its loss by reason of said contract.

Hence we think that the court erred in rendering judgment against the latter company for the value of the cotton so lost. We therefore sustain this assignment.

Appellees insist, by a cross-assignment duly presented, that the court erred in sustaining the plea in abatement of Thomas J. Free-

man, receiver of the International & Great Northern Railroad Company, and dismissing said Freeman from the case with costs. It was shown that the cotton was received for shipment by the I. & G. N. Company during the month of October, 1906, and it is alleged that it was converted by both of said companies during the year 1907. It appears from the allegations of the pleading, as well as the evidence, that Freeman was appointed receiver of said company in February, 1908, and it is not alleged nor shown that the plaintiffs obtained leave from the Federal Court in which the receivership was pending to prosecute this suit against said receiver. This being true, we think the judgment of the court below dismissing said receiver with his costs was correct. The rule seems to be well settled that at common law a receiver could not be sued without the permission of the court appointing him. (See Alderson on Receivers, p. 711, sec. 519.) But this rule has been changed by statute in some of the States, as well as by an Act of Congress. The third section of the Acts of Congress of March 3, 1887, and August 13, 1888, reads as follows: "That every receiver or manager of any property appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which said receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed so far as the same shall be necessary to the ends of justice."

We hold that in order to prosecute a suit against a receiver appointed by a Federal Court without leave of the court, the suit must be predicated upon some action of the receiver or his predecessor in carrying on the business connected with such property; so that it is clear that if the cause of action accrued prior to the appointment of the receiver, then leave of the court must be obtained to prosecute the suit before the action could be maintained; and failure to obtain such leave justifies the court in dismissing the receiver from such proceedings. In Alderson on Receivers, p. 731, it is said, after discussing this statute and the decisions under it, that "The congressional statute under consideration may be said to support the following propositions: A suit may be instituted against a receiver appointed by a Federal Court, and prosecuted to final judgment without the consent of the court, the subject matter of which arose out of some act or transaction of the receiver, his predecessor or the employes and agents of either of them, in the actual operation of the property in his possession and continuation of the business for which such property was used. Second. A suit against a receiver of a Federal Court which has not for its object the vindication of a wrong or the enforcement of a right arising from some act or transaction of the receiver or his predecessor, or the employes and agents of one of them, in the actual operation of the property in his possession and continuation of the business for which such property was used, without the consent of the court, can not be maintained, and according to the rule of the federal judiciary, a judgment rendered in such suit will be void, because of want of jurisdiction."

See also Smith v. St. Louis & S. F. Ry. Co., 52 S. W., 378, in which

it is said by the court: "This proceeding against the receivers appointed by the Circuit Court of the United States for the Eastern District of Missouri, is without any permission or authority from that court, and hence can not be maintained. The cause of action did not arise or accrue while the receivers were in charge of and conducting the business, and therefore the plaintiff does not come within the provisions of the Act of March 3, 1887 (24 Stat., p. 554). The accident complained of occurred on the 20th of October, 1893, and the receivers were not appointed until December 23, 1893. Receivers are officers of court to hold and manage property which is in the registry of the court, and persons having any claim to property so situated must submit their claims to the court that has obtained jurisdiction over the *res,* and the court will not permit its officers to be sued in any other tribunal without its consent. This is not only a law of comity among courts, but it is a jurisdictional necessity, for it is manifest that two courts could not, acting separately, successfully manage the property or harmoniously distribute it." Citing Beach on Receivers (Alderson's ed.), secs. 229-240; Kerr on Receivers (2d ed.), pp. 196 et seq. "The petition does not aver that the consent or permission of the United States Circuit Court to sue its receiver was asked or obtained before this action was begun, and there is a total lack of evidence of any such steps having been taken. The action can not, therefore, be maintained, and the judgment against the receivers, or as amended, that the judgment against the company be certified to the receivers, is reversed." (See also 34 Cyc., pp. 411, 416b and 417.)

The case seems to have been fully developed in the court below. We therefore conclude that the judgment, so far as the same affects the Galveston, Houston & Henderson Railroad, should be reversed and here rendered in its favor; but that the judgment against the International & Great Northern Railroad Company, as well as the judgment in favor of T. J. Freeman, receiver, be and the same is in all things affirmed, and it is so ordered.

Affirmed in part and reversed and rendered in part.

Writ of error refused.

WELLS-FARGO & COMPANY v. J. B. BURFORD ET AL.

Decided March 16, 1910.

1.—Jurisdiction—Amount in Controversy.

Items in plaintiff's claim which on the face of the pleadings could form no proper basis for suit (attorney's fees and traveling expenses where such were not elements of damage) should not be considered in determining the amount in controversy.

2.—Same—Reconvention.

The amount claimed by defendant in reconvention can not be added to that sued for by plaintiff to make the amount in controversy such as to give the court jurisdiction on appeal.

Appeal from the County Court of Falls County. Tried below before Hon. W. E. Hunnicutt.

E. W. Bounds, for appellant.

N. J. Lewellyn and *Spivey, Bartlett & Carter,* for appellee

JENKINS, ASSOCIATE JUSTICE.—W. H. Kiblinger & Company shipped an automobile to appellee, Dr. J. B. Burford, at Rosebud, Texas, which appellee refused to receive. He brought suit against Kiblinger & Company for $250, and levied an attachment on said automobile, the same being in possession of the Wells-Fargo Express Company and held for express charges, amounting to $68.87. This suit was afterwards settled by the parties, and has no further connection with the two suits involved in this appeal, and is here referred to to explain the suit of the express company against the sheriff.

On July 3, 1908, the express company brought suit in Justice's Court, precinct No. 1 of Falls County against the sheriff of said county, to recover express charges on said automobile, the same having been taken from the possession of the express company by said sheriff on the writ of attachment above referred to. In this suit the express company recovered judgment against the sheriff for its charges, $68.87, and interest thereon. This suit was appealed to the County Court of Falls County.

On August 10, 1908, J. B. Burford brought suit against the express company in precinct No. 8, Falls County, for $99, damages to said automobile in shipment of the same, Burford having accepted said automobile from Kiblinger & Co.

The express company plead in reconvention against Burford and against the sheriff its charges on said automobile and for $35 attorney's fees and $10 traveling expenses in attempting to collect said express charges. No attempt was made to foreclose on said automobile for its charges; on the contrary, it alleged that it had been deprived of its lien on said automobile by reason of the same having been forcibly taken from its possession. Upon trial of this case in the Justice's Court, Burford obtained judgment against the express company for the damages claimed by him, $99. From this judgment the express company appealed to the County Court of Falls County.

In the County Court these two cases were, by agreement, consolidated and submitted to the court without the intervention of a jury. The County Court found in each case as did the Justice Courts, and offsetting the judgment for Burford for $99 with the judgment for the express company for $75.06, its charges with interest, rendered judgment over in favor of Burford against the express company for the balance, $23.94. From this judgment the express company has appealed.

Appellee moves to dismiss this appeal for the reason that the amount in controversy is not sufficient to give this court jurisdiction. We think the contention of the appellee is sound.

It is true that the express company in its plea in reconvention asks judgment for $117.78, but two of these items, amounting to $45, are for attorney's fees and traveling expenses. No exemplary damages are claimed. For these two items it is clear that the express company had no right to sue; and, deducting these from the $117.78, the amount

in controversy is less than $100. Where it appears on the face of the pleadings that a portion of the items sued for could form no proper basis for suit, they should not be considered in determining the amount in controversy. (Franklin Ins. Co. v. Blackwell, 87 S. W., 361; W. U. Tel. Co. v. Arnold, 97 Texas, 365, 79 S. W., 8; Moore v. Snell, 88 S. W., 270; Conner v. Sewell, 90 Texas, 275, 38 S. W., 35; Carswell v. Habberzettle, 99 Texas, 1, 86 S. W., 738; Texas & P. Ry. Co. v. Butler, 86 S. W., 800; St. Louis S. W. Ry. Co. v. Hill, 97 Texas, 506, 80 S. W., 368.)

The suit by Burford against the express company was for $99, and the express company sued in reconvention, exclusive of interest, attorney's fees and traveling expenses, for $68.78, but these two amounts can not be added together to determine the amount in controversy in this suit (Crosby v. Crosby, 92 Texas, 441, 49 S. W., 359; Tucker v. Williams, 56 S. W., 585; Keil v. Campbell, 63 S. W., 659.)

The motion is sustained and the appeal is dismissed at the cost of appellant.

Dismissed.

HIGHTOWER BROTHERS v. W. F. TAYLOR COMPANY, LIMITED.

Decided March 17, 1910.

1.—Evidence—Written Instrument—Subscribing Witnesses.

Proof of the execution of a written instrument attested by subscribing witnesses can not be made by evidence of the handwriting without showing that the testimony of such subscribing witnesses can not be had.

2.—Vendor's Lien—Homestead—Collateral Security—Foreclosure.

A note secured by a vendor's lien against the homestead having been paid by a third party at request of the maker, the latter could foreclose the lien if the transaction was a purchase of the note and transfer of it to him. If the transaction was a payment made for the purpose of discharging the lien, turning over the note by the maker to the one paying it as collateral security for other indebtedness would be the creation of a lien against his homestead and forbidden by law.

Appeal from the District Court of Harrison County. Tried below before Hon. W. C. Buford.

W. C. Lane, for appellant.—When the execution of a written instrument having subscribing witnesses is denied under oath the execution of such instrument must be proved by such subscribing witnesses. Lewis v. Bell, 40 S. W., 747, 11 Am. & Eng. Ency. Law, 589.

Beard & Davidson and *S. P. Jones,* for appellee.—W. M. Hightower, in writing, renewed the vendor's lien note on said land for $2,000, and Mattie Hightower and W. M. Hightower had no homestead interest superior to vendor's lien on said land to secure the purchase money. Baker v. Collins, 4 Texas Civ. App., 520; Jackson v. Bradshaw, 24 Texas Civ. App., 30.

LEVY, ASSOCIATE JUSTICE.—Appellee sued for a debt and to fore-

close the vendor's lien on certain land and an attachment lien on certain land, and to foreclose a chattel mortgage on personalty. Among other defenses plead, the appellants denied under oath the execution of the chattel mortgage sued on. The case was tried to a jury, and judgment was entered upon their findings on special issues.

Appellants assign error upon the ruling of the court in allowing appellee to offer in evidence the chattel mortgage sued on. The chattel mortgage was signed "Hightower Bros.," and was not acknowledged or proved by the parties who signed it, but was attested to by two subscribing witnesses. The bill of exception shows that appellee, over objection of appellants and without offering the testimony of either of the two subscribing witnesses or offering to account for the absence of the testimony of the attesting witnesses as to the execution of the mortgage, offered to prove the execution of the mortgage by proof of the handwriting of W. M. Hightower, of the firm of Hightower Bros. It is a fixed rule as to execution and proof of documents, that where there are subscribing witnesses to the document they must first be produced to prove its execution or the absence of their testimony must be satisfactorily accounted for before resort can be had to other evidence in proof of the execution of the document. 1 Greenleaf, sec. 569; ibid. vol. 2, sec. 158; 2 Blackstone, sec. 368; 11 A. & E. Ency., p. 589; 14 Ency. of Ev., p. 758; 2 Wigmore on Ev., sec. 1287; International & G. N. Ry. Co. v. McRae, 82 Texas, 614, 18 S. W., 672; Smith v. Dunman, 9 Texas Civ. App., 319, 29 S. W., 432; Lewis v. Bell, 40 S. W., 747. The reason for the rule is that the parties, by selecting the witnesses to attest the instrument, have agreed to depend upon their testimony as to the fact of execution; and because that is the best evidence to be had of the fact of execution, their evidence must first be produced, if possible to be obtained, before secondary evidence can be resorted to. Appellee urges that proof of handwriting, accompanied by proof of manual delivery of the document by one of the partners, is sufficient to supply proof of its authenticity and to let the instrument in evidence. So stringent is the common law rule that the execution of a document can not be otherwise proved if it be possible to produce the subscribing witnesses, that even proof of extrajudicial admission of the maker is inadmissible until it is first shown that the subscribing witnesses can not be had. 1 Greenleaf, sec. 569b; Richmond & D. Ry. Co. v. Jones, 9 So., 276. The verified denial of the execution of the mortgage by appellants required the appellee to produce evidence of its execution and delivery as required by the common law rule of evidence. Evidence of handwriting of the maker, or any other circumstance tending to show the due and valid execution of the instrument, is admissible as evidence, but not until it is first shown that the direct testimony of the subscribing witnesses on the point of execution is unattainable. 14 Ency. of Ev., pp. 782, 785. The authorities cited by appellee are applicable to the exceptions laid down to this common law rule of evidence. 1 Greenleaf, sec. 571; 14 Ency. of Ev., p. 736. For example of the exceptions, where a deed is used to show color of title or extent of claim by one claiming title through adverse possession, the claimant does not rest on the authenticity of the deed, but upon its contents as embodying the extent of

the claim. In this suit there is no claim by appellants made under the instrument sued on. The evidence might be admissible, as contended, on estoppel from questioning the validity and effect of the mortgage. But until the instrument is properly in evidence its effect and validity as a mortgage, as against the partners, is not an issue. Because appellee did not properly and sufficiently prove execution of the mortgage as a preliminary to reading the mortgage in evidence, there was error in admitting the mortgage in evidence. In passing, we say that this court would hesitate to reverse the case if this were the only error.

The appellant, W. M. Hightower, challenges the judgment in this case in foreclosing a vendor's lien against the land in suit, because it was his homestead. If the appellee was the purchaser and owner in good faith of the land note, then it was proper to foreclose the lien against the land in question. The appellee so alleges in its original petition, that it was the purchaser and owner of the land note. In its supplementary petition it alleges that the land note was delivered to it by appellants "as collateral security for their said indebtedness as evidenced by the account of Hightower Bros. attached to plaintiff's amended original petition, and the said Hightower Bros. so delivered said note as collateral security for said account as aforesaid." The prayer is for judgment upon the account and also upon the collateral note, and that the proceeds of the sale of the land be applied to the account and indebtedness due by appellants. The judgment as entered recites that the jury found that the appellee held the land note as collateral security to secure the payment of the account due and owing to the appellee. If it be true that appellee paid the land note for appellants with the intention and purpose of discharging the debt against the land, and that the debt was so discharged, and after the debt was so discharged the appellants delivered the note to appellee as collateral security for the account owing for goods, and the appellee holds the land note as collateral security to secure the payment of the store indebtedness against appellants, then there was error in foreclosing a lien against the homestead. If the debt was paid, and the payment was for the purpose of discharging the lien against the land, and the appellee was not the purchaser of the note as such, then there would be no valid lien as against the homestead to foreclose. The purchase money on the homestead having been paid with the intention of discharging the lien, then any subsequent agreement with reference to holding the note as a lien note against the homestead as collateral security for other indebtedness would, as against the homestead, be a void transaction. If, however, appellee was the bona fide purchaser by assignment of the note, and sues thereon as the owner and holder of the note, then the lien could be foreclosed. As the decree is entered it gives force to the findings of the jury that appellee held the land note as security for the entire debt of $3,335.47, which includes the draft for the land note and orders sale for the purpose of paying all the indebtedness. This was error in any phase of the case. If the note was held as collateral security for the store indebtedness, it would, in effect, be allowing a lien against a homestead for such debt, and be void by the terms of

law. If the appellee held the note as assignee, he was entitled to a foreclosure for the amount due on the note, and the proceeds above that amount as against a homestead claim could not be otherwise applied in the judgment.

The judgment was ordered reversed and remanded for another trial.

Reversed and remanded.

J. T. PLUMMER ET AL. v. C. MARSHALL.

Decided March 17, 1910.

1.—Pleading—Description of Land—Demurrer.

Objection to the sufficiency of description of land can be made by general demurrer only when it is manifest from the face of the petition that it can not be identified.

2.—Boundaries—Older Surveys.

Calls for corners of older surveys are considered as artificial objects, inferior in dignity only to calls for natural objects.

3.—State Boundary—Water Course—Accretion and Avulsion.

The question whether a change in a watercourse forming the boundary between States and called for as the boundary of a grant of land was by accretion, making the added soil within the limits of the State on the side where it was added, or by sudden avulsion, leaving the former State boundary unaffected, is one of fact, and the burden of proving that it was of the latter character is on the party asserting rights upon that theory.

4.—Deed—Description—Omission of Name of Survey.

A deed conveying land by metes and bounds sufficient to identify its location is good though it omits reference to the original grant from the State of which it forms a part.

5.—Prior Possession.

Facts considered and held sufficient evidence of prior possession by those whose title plaintiff had to support recovery against one holding under the same title by subsequent conveyance.

6.—Common Source—Outstanding Title.

Land was formed by accretion to a tract granted by the State with boundary on Red River. Neither party showed title from the original grantee, both claiming under H., who had obtained a deed to it and conveyed it to M., under whom plaintiff claimed, and subsequently conveyed it to R., under whom defendants claimed. Possession was first taken under the deed to M. In an action by one holding from him, defendant, who held from R., could not defeat recovery upon plaintiff's prior deed and prior possession by proof of the original grant from the State as an outstanding title.

7.—Judgment.

Appellants cannot complain that the judgment against them for the recovery of land is not sufficient to identify it, especially when such defect is not apparent in the face of the judgment and it follows the description in the petition, possession of which they admitted by their plea.

Appeal from the District Court of Fannin County. Tried below before Hon. Ben. H. Denton.

McGrady & McMahon, for appellants.—The evidence showed the

land to be in Oklahoma, not in Texas. 5 Cyc., 899, 904; Collins v. State, 3 Texas Crim. App., 323; United States v. Texas, 162 U. S., 27, 29.

The theory of recovering upon prior possession of land is not a rule of property but is merely a rule of evidence subject to be rebutted, and when it is shown that a prior possession is not in fact title, then it will not authorize a recovery in favor of the plaintiffs relying upon such prior possession. Robertson v. Kirby, 25 Texas Civ. App., 472.

Richard B. Semple, for appellee.

HODGES, ASSOCIATE JUSTICE.—This is an action of trespass to try title to 83 acres of land situated on the south side of and adjacent to Red River in Fannin County. From a judgment in favor of the plaintiff in the suit the defendants have appealed. The sufficiency of the petition in describing the land sued for is attacked in a general demurrer. It is contended that the field-notes call for only one object, either natural or artificial, and that object is Red River. The field-notes call for two corners of the Cox survey, and from its N. W. corner to run at a definite variation to Red River. The lines and corners of an older survey are considered artificial objects in the description of land, and in point of dignity second only to natural objects. The objection to the sufficiency of the description can be made by a general demurrer only when it is manifest from the face of the petition that the land can not be distinguished from all other tracts. Crabtree v. Whiteselle, 65 Texas, 111; Goldman v. Douglas, 81 Texas, 650, 17 S. W., 235. That defect does not appear from the petition in this case.

It is also contended that the land in controversy is situated within the State of Oklahoma, and that the court was without jurisdiction over the subject-matter of the suit. The description shows that the land is bounded on the north and east by the present channel of Red River, and on the south by the original N. B. line of the William Martin survey. The evidence shows that the Martin survey was patented in 1845, and in its field-notes calls for the south bank of Red River as its N. B. line; that since that time the channel of the river has changed to the north, and was at the time of the trial in the court below from one-fourth to one-half a mile distant from where it was when the Martin survey was patented. In the space between the present and the former channel is a considerable area of low flat land built up by accretion, and in that space is located the land in dispute. The appellants contend that this accretion formed by the shifting of the course of the stream is the result of a sudden avulsion, occurring under such conditions as would leave the original boundary line between Texas and Oklahoma at the place occupied by the old channel. Whether the shifting of the course of a stream forming the boundary line between two States is brought about by such conditions as would leave the original location of the line undisturbed, or would carry it with the new channel, involves an issue of fact that must be decided by the proper tribunal, the trial court. The party who asserts that the channel of a watercourse recognized as the boundary line, is

not in fact, at the point in controversy, the true boundary, resting his contention upon a sudden shifting of the course of the channel, assumes the burden of proving that fact. The rule for determining whether the boundary line remains with the old channel or follows the shifting course of the stream, has been so fully discussed and so clearly stated in the following cases that we merely refer to them: Nebraska v. Iowa, 143 U. S., 359, 36 L. ed., 186; McBaine v. Johnson, 55 S. W., 1034; Denny v. Cotton, 3 Texas Civ. App., 634, 22 S. W., 122. While the court found that the channel of Red River had changed its course since the location of the Martin survey, his judgment involves the further finding that this change did not occur under such conditions as would prevent the line between the States from following the new channel. The testimony upon that issue is not such as would justify us in saying that the judgment of the court was unsupported by the evidence. It is a matter of common knowledge that large streams, like Red River, passing through a loamy soil, when great rises occur, often shift their channels—sometimes moving a considerable distance, first to one side and then to the other, leaving but little evidences of where the main channel formerly ran. If the facts relied upon by the appellants in this case for showing that the boundary line between Texas and Oklahoma remained undisturbed by the change in the course of the river, were applied in all cases where similar changes have taken place, it would, doubtless, be exceedingly difficult in many instances to now locate the true line between the two States.

The testimony shows that if either party to this suit has any paper title to the land involved in this litigation it was obtained from M. M. Henry. In 1884 Henry acquired 111 acres immediately south of and adjacent to this tract. Whether this accretion had all been formed at that time does not clearly appear, but we think the evidence justifies the conclusion that most, if not all, of it had. At any rate, Henry claimed the land thus formed at the north of his 111 acres, and in the following year, 1885, sold it to J. J. Moss, under whom the appellee claims by a regular chain of title. The deed from Henry to Moss described the land by metes and bounds, but did not designate it as a part of the Martin survey. In 1888 Henry conveyed the 111 acres above mentioned to G. N. Rice, under whom the appellants claim by regular chain of transfers. The deed from Henry to Rice contains the following description: "111 acres of the Wm. Martin survey, Beginning at the northwest corner of a 50 acre tract sold to James Ball by said Wm. Martin, a stake in Martin's west line from which a blackjack marked "X" bears north 75 east 3 varas, a post-oak marked "X" bears 45 east 10 varas, thence north 84 east with Ball's north line 531 varas, his northeast corner in W. H. C. Johnson's west line a small elm marked "B" from which a small ash marked "W" bears north 80 west 1½ varas; thence with the west line of 272¾ acres sold by said Martin to said Johnson 1140 varas Johnson's N. W. corner; thence N. 78 W. along the south bank of Red River at 550 varas to the N. W. corner of said Martin survey. Thence with the west line of the same S. 6 E. 1220 varas to the beginning." This description is a substantial, and practically a lit-

eral, copy of that contained in the deed to Henry from his grantor. It follows that if the deed from Henry to Rice was sufficient in its terms to convey the accretion to the 111 acres, Henry had previously acquired it by a similar description in the deed from his grantor. If Henry then owned the title, it is clearly shown that he parted with it to Moss three years before any conveyance was made to Rice. If Henry never owned any title to this accretion, then the appellants have none. On the question of prior possession the court made the following finding: "I find that J. N. Ferguson while he claimed said land in controversy under said deed from J. J. Moss fenced in said land in controversy with other lands in said river bottoms conveyed to him in said deed and cultivated a portion of said bottom lands through renters; that said J. B. Cummins when she purchased said lands from C. L. Potter repaired the fencing around said bottom land and had a portion of it cultivated by renters; that plaintiff since his purchase of said land in 1900 had repaired said fences, had a portion of said land cultivated, and was in possession of said land when defendants took possession thereof as complained of by plaintiff in his petition filed in this cause, though defendants when they took such possession found a portion of the wires on said fence broken by the high waters of said river when its banks were overbowed last prior thereto." This, we think, is sufficient to show prior possession good as against a mere trespasser. Appellants insist that prior possession is not sufficient when it is shown that the claimant asserting it in fact has no title. This contention rests upon the assumption of the usual effect of showing an outstanding legal title. Where the parties deraign title from a common source, evidence of title in some one anterior to the common source is not of itself sufficient to defeat the right of the claimant when depending upon a regular chain of transfers from the common source. Rice v. St. Louis, Ark. & T. Ry. Co., 87 Texas, 90, 26 S. W., 1047.

The fact that the conveyance from Henry to Moss did not describe the land as a part of the Martin survey is of no consequence in determining the rights of the parties. If the description was otherwise sufficient to designate the land conveyed, this omission was immaterial.

Appellants also contend that the judgment rendered in this case was void because not susceptible of identification on the ground. This fact does not appear from the face of the judgment or of the pleadings. Neither does the evidence necessarily show any defect in the description of the land. By their plea of not guilty the appellants admitted that they were in the possession of the land referred to in the petition. The effect of the judgment is to oust them from that possession. But even if it be true that the judgment is void for the reasons indicated, it does not appear to us that it is a matter of which the appellants could complain in this appeal.

Finding no error in the judgment it is accordingly affirmed.

Affirmed.

Writ of error refused.

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Abandonment.

Sale of homestead by husband. See *Homestead, 13, 14, 15.*

Abatement.

Suit before maturity of note. See *Harmless Error, 2.*
Diseased and offensive animal. See *Nuisance, 1.*
Encroachment upon sidewalk. See *Nuisance, 2.*
Operation of cotton gin. See *Nuisance, 4-8.*

1. The mere fact that a suit is pending in another county to rescind a contract of purchase of certain personal property and to cancel the notes given for the same, is not sufficient cause for the abatement of a suit subsequently instituted for the collection of said notes. The doctrine of the common law that a suit pending between parties precludes them from maintaining between themselves another suit on the same cause of action in courts of the same jurisdiction, is not enforced in this State. *Garza & Co. v. Jesse French P. & O. Co.*, 590.

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Administration.

Resignation of executor. See *Executors, 1.*
Powers of executor. See *Wills, 1.*

1. The fact that the heirs of an intestate partitioned the estate among themselves by decree of the District Court will not deprive the County Court of jurisdiction to grant letters of administration upon the estate at the instance of a creditor at any time within four years from the intestate's death, and to subject the property of the estate so partitioned among the heirs to the payment of debts. *Salas v. Mundy,* 407.
2. In a collateral attack upon an administrator's sale of land by heirs who had previously partitioned the estate among themselves, the burden of proof is on them to show from the record in the administration proceeding that the probate court had no jurisdiction and that therefore the sale was void. The presumption is to the contrary. *Id.*
3. When letters of administration have been granted after the required notices have been given and the heirs make no contest in the matter, a conclusive presumption exists that the probate court acted upon proper and ample evidence. *Id.*
4. Some community debts may be chargeable against the wife's separate estate and therefore will warrant administration on the same. *Id.*
5. The cashier of a bank having conducted a transaction between the bank and a decedent and therefore cognizant of all the facts, is the proper party to make affidavit to a claim against the decedent's estate, growing out of said transaction. A corporation can only make affidavit by an officer and the affidavit of the officer in the case will be considered as the affidavit of the owner of the claim. *Dowell, Admr., v. Collin County Natl. Bank,* 244.
6. An affidavit to a claim against an estate "that there are no offsets, credits or payments due on the same," and that a certain amount is due thereon, is equivalent to saying that all legal offsets, payments and credits known to affiant have been allowed. *Id.*

Administrator.

1. After the appointment of an administrator with the will annexed he would have the exclusive right as against the legatees and devisees to sue for the recovery of property belonging to the estate. *Wisdom v. Wilson,* 503.

Administrator's Sale.

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Revocation by death. See *Powers, 5, 6, 8.*

1. An agent appointed to collect the rents from certain property and pay over the same to a third party would have no right, without the consent of the assignee, to apply the rents to repairs on the property. *Dowlen v. George Mfg. Co.,* 124.

Agreed Price.

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Of amount of claim. See *Practice on Appeal, 6.*

Amount in Controversy.

Amendment on appeal. See *Practice on Appeal, 6.*

1. Items in plaintiff's claim which on the face of the pleadings could form no proper basis for suit (attorney's fees and traveling expenses where such were not elements of damage) should not be considered in determining the amount in controversy. *Wells-Fargo & Co. v. Burford,* 645.
2. The amount claimed by defendant in reconvention can not be added to that sued for by plaintiff to make the amount in controversy such as to give the court jurisdiction on appeal. *Id.*
3. A pleading in Justice Court alleging items of damage aggregating more than $200 showed a case beyond the jurisdiction though the petition closed with a general allegation of damages in the sum of $200. *Texas & P. Ry. Co. v. Hood,* 363.
4. A docket entry in Justice Court can only be made from the claim or petition of plaintiff. Where he filed a written petition showing damages exceeding $200, the case was beyond the jurisdiction, though entered on the docket as a claim for $200. *Id.*
5. In the absence of evidence to show, and of a finding, that a plaintiff had alleged the amount in controversy at an amount beyond the jurisdiction of a Justice's Court for the fraudulent purpose of conferring jurisdiction on the County Court, it is the duty of the County Court to render judgment for the amount found to be actually due although it be below the original jurisdiction of that court. *Garth v. Childs,* 488.

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Appeal.

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Procedure in appellate court. See *Practice on Appeal, 1-17.*

1. A Court of Civil Appeals has no jurisdiction of an appeal from a

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County Court in a case originating in the Justice Court wherein the amount sued for is $100. *Walker v. De Villeneuve,* 476.

2. Where the jurisdiction of the Court of Civil Appeals depends upon the amount in controversy it is not permissible in determining the amount in controversy to add together the amount sued for by the plaintiff and the amount sued for by the defendant by plea in reconvention. Either the plaintiff's demand or that of the defendant must in and of itself reach the jurisdictional sum. *Id.*
3. To support the jurisdiction of the appellate court, it is necessary that the record show that the case was one within the jurisdiction of the court from which the appeal was taken. *Needham v. Austin Elec. Ry. Co.,* 144.
4. On appeal from a judgment of the County Court, plaintiff's petition, which was for the recovery of damages in the sum of $160, appeared to have been filed originally in Justice Court, but the record contained no transcript and appeal bond showing that the case was there tried and appealed to the County Court. Held, that it not being made to appear that the County Court had original jurisdiction over the cause of action, nor that it had acquired jurisdiction by appeal, the Court of Civil Appeals should, on its own motion, dismiss the appeal. *Id.*
5. The filing in a Court of Civil Appeals of a second transcript of a proceeding for an injunction, within fifteen days after the date of the filing with the clerk of the court of the petition with the judge's order endorsed thereon, satisfies the requirement of the statute that the transcript in such case must be filed in the appellate court not later than fifteen days after the entry of the order of the court, and obviates any objection to the first transcript on the ground that it did not affirmatively appear therefrom that it was filed in due time. *Holbein v. De La Garza,* 125.

Approval.

Of illegal sale. See *County School Land, 1.*

Argument of Counsel.

Reading decisions to jury. See *Practice in Trial Court, 3.*

1. Although not controlling in every case, it is the rule that when the trial court instructs the jury to disregard an improper argument and the counsel making the argument withdraws the same and asks the jury not to consider it, the argument is not sufficient cause for reversing the judgment. *Continental Casualty Co. v. Deeg,* 35.
2. Where, in a suit against a railroad company for damages for personal injuries, the testimony was sharply conflicting upon a material issue, but there was no contradiction or inherent improbability in the testimony of the witnesses for the defendant and no effort was made to impeach them in the regular way, it was error for the trial court to ignore an objection by defendant to the suggestion or insinuation of counsel for plaintiff in his closing argument that the witnesses for defendant had concocted the defense; and the fact that the charge of perjury was veiled in the form of a suggestion rendered it none the less prejudicial. *Ft. Worth Belt Ry. Co. v. Johnson,* 105.
3. Reference in argument to the poverty or wealth of contending parties is almost if not quite universally condemned. Such argument considered and held reversible error. *Id.*

Assault.

Character of party assaulted. See *Evidence, 22.*
Death in personal difficulty. See *Insurance, Life, 2, 3.*
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On wife of plaintiff. See *Offset, 2.*

1. Offensive or exasperating words or conduct will not justify an assault. A charge which allowed plaintiff to recover only in case the assault was "unprovoked" was erroneous. *McCormick v. Schtrenck,* 139.

Assessment.

For street improvements. See *Cities, 1, 2, 3; Constitutional Law, 2, 3.*
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By agent to collect rent. See *Agency, 1.*
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Assignment of Error.

Propositions not germane to. See *Briefs, 4.*
Not copied in brief. See *Briefs, 6.*
Cross assignments by appellee. See *Practice on Appeal, 8.*

1. In an appeal from the order of a judge granting a temporary injunction formal assignments of error are not necessary under the Act of 1909. (Gen. Laws, p. 354.) *Holbein v. De La Garza*, 125.
2. An assignment of error not found in the record nor presenting fundamental error, but raised for the first time in the brief, will not be considered. *Sutor v. International & G. N. R. Co.*, 73.
3. An assignment of error based upon two different statements made by counsel in his argument to the jury, and involving the decision of two separate and distinct questions, is not in accordance with the rules regulating the briefing of cases on appeal and is therefore not entitled to consideration. *Baum v. McAfee*, 56.

Assumed Risk.

Known negligence of master. See *Master and Servant, 15.*
Evidence insufficient to raise issue. See *Master and Servant, 22, 26.*
Action under direction of foreman. See *Master and Servant, 23.*
Knowledge of defect and danger. See *Master and Servant, 30, 31, 32.*
Continuing in service. See *Master and Servant, 33.*
Promise to repair defects. See *Master and Servant, 34, 35.*
Statute abolishing defense. See *Master and Servant, 36.*

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Purchaser under lien. See *Innocent Purchaser, 1, 2.*

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Confidential communication. See *Evidence, 2.*
Notice to. See *Notice, 1.*
Reading decisions to jury. See *Practice in Trial Court, 3.*

Attorney's Fees.

Failure to plead. See *Vendor and Purchaser, 7.*

1. Promissory notes sued upon provided for ten percent attorney's fee if placed in the hands of an attorney for collection; the petition alleged that plaintiff had been compelled to place the notes in the hands of an attorney for collection and to institute suit to collect the same; the proof showed that the notes were placed in the hands of an attorney for collection under an agreement that plaintiff would pay ten percent of the amount as attorney's fee and said sum was reasonable. Held, judgment was properly rendered for said attorney's fee. *Garza & Co. v. Jesse French P. & O. Co.*, 591.

Award.

Interest upon. See *Eminent Domain, 1.*

Banks and Banking.

Authority of cashier. See *Administration, 5.*
Notice to officers or directors. See *Gaming Transaction, 1.*

It is held in this State that a check drawn upon a bank by a depositor amounts to an equitable assignment of so much of the fund in favor

Banks and Banking—*Continued.*

of the drawee as is necessary to pay it; and by the law merchant an endorsement of a check in bank for collection, when passed to the credit of the drawee and drawn against by him, amounts to a transfer of the legal title to the fund against which check is drawn. *Vaughn v. Farmers and M. Natl. Bank of Alvord*, 381.

Bankruptcy.

1. A judgment debtor is relieved from payment of the judgment when the same has been duly scheduled and the judgment creditor notified of the bankruptcy proceeding. Execution should not thereafter issue on such judgment. *Kruegel v. Murphy & Bolanz*, 482.
2. In the absence of evidence that a personal judgment reverted to a bankrupt at the close of bankruptcy proceedings against him, it will be presumed that the title thereto had passed out of him, and he would have no right to demand that execution issue thereon or to collect the same. *Id.*

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Bill of Exceptions.

To findings of court. See *Findings, 1, 2.*
To admission of evidence. See *Practice on Appeal, 12.*

1 Under the provisions of article 1360, 1366, 1368 and 1369, Rev. Stats., only the party excepting to the ruling of the court and dissatisfied with the bill of exception which the trial judge is willing to give, may resort to a bill of exceptions by bystanders. It was not intended that the party in whose favor the ruling was made should prove up a bill of exception reflecting his version of what occurred and the court's ruling thereon. Nor does the fact that the judge failed or refused to submit to the adverse party the bill prepared by the party taking it, authorize such procedure. *Baum v. McAfee*, 55.

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Of accounts of guardianship. See *Guardian and Ward, 1-7.*

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Reason for refusing payment. See *Estoppel, 2.*
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Failure to indorse credit. See *Judgment, 9.*
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Bonds.

To procure issuance of writ. See *Garnishment, 1.*

Boundaries.

Possession under deed restricted to. See *Limitation, 7.*
Newly discovered evidence. See *New Trial, 1.*
Survey to ascertain. See *Surveyor, 1.*

1. The principles giving controlling effect to certain calls in ambiguous description of land discussed. *Ramseaur v. Ball*, 285.
2. The beginning corner is of no greater dignity than others in the description of land. Where a deed called for marked bearing trees at the beginning corner on the East line of the original survey, and for the Southeast corner, and for a given distance between, the beginning cor-

Boundaries—*Continued.*

ner should be placed at the distance North from the Southeast corner so called for, unless a point further North on the East line could be identified by the bearing trees or other evidence, as the place marked and designated for beginning. *Id.*

3. Calls for corners of older surveys are considered as artificial objects, inferior in dignity only to calls for natural objects. *Plummer v. Marshall*, 653.
4. The question whether a change in a watercourse forming the boundary between States and called for as the boundary of a grant of land was by accretion, making the added soil within the limits of the State on the side where it was added, or by sudden avulsion, leaving the former State boundary unaffected, is one of fact, and the burden of proving that it was of the latter character is on the party asserting rights upon that theory. *Id.*

Briefs.

Failure to file. See *Practice on Appeal*, *9*.

1. An assignment of error not containing nor followed by a proposition showing ground for reversal will not be considered. *Western U. Tel. Co. v. Timmons*, 146.
2. An assignment, in general terms, of error in overruling a general demurrer, though sufficient as an assignment, must be followed in appellant's brief by appropriate propositions presenting specific questions of law, in order to entitle it to consideration. *Easterwood v. Burnett*, 521.
3. A brief asserting error in the rulings on admissibility of evidence must show the objections made to its introduction. *Id.*
4. A proposition that the court erred in excluding the testimony of certain witnesses, is not germane to an assignment of error that the court erred in instructing a verdict for the appellee, and therefore can not be considered on appeal. *Sarro v. Bell*, 152.
5. Where there is a discrepancy between the briefs and the transcript on appeal as to the pleadings of the parties, the transcript must control although the adverse party impliedly admits that the brief is correct. *Orange Lumb. Co. v. Thompson*, 562.
6. An assignment of error as filed in the trial court contained in the first paragraph explicit complaint that the judgment of the trial court was erroneous, and in subsequent paragraphs or subdivisions stated, in the form of propositions of law, the reasons for the contention. But the assignment as carried into appellant's brief omitted the first paragraph wherein the ruling of the court was explicitly complained of and the brief contained only the abstract propositions of law. Held, the brief did not comply with the requirements of rules 29 and 30 concerning the preparation of briefs, and the assignment was therefore not entitled to consideration. *Wisdom v. Wilson*, 593.

Burden of Proof.

To show absence of jurisdiction. See *Administration*, *2*.
Change of State boundary on water course. See *Boundaries*, *4*.
Notice of unrecorded deed. See *Innocent Purchaser*, *1*, *2*.
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Of causal connection. See *Railways*, *7*.

Calls.

Controlling effect of. See *Boundaries*, *1*, *2*.
For corners of older survey. See *Boundaries*, *3*.

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Injury to riparian owners. See *Limitation*, *2*, *3*.
As highways of commerce. See *Navigable Waters*, *1*.

Carriers of Goods.

Transportation of cattle. See *Damages, 9-13.*
Delay in movement of trains. See *Evidence, 17, 18.*

1. In a suit for damages to goods shipped by rail, evidence that plaintiff shipped them to a third party, without other proof as to ownership, did not entitle him to maintain the action. The testimony constituted prima facie evidence of title in the consignee. *Mexican Cent. Ry. Co. v. Locke,* 402.
2. To recover damages against the terminal carrier the proof must show that the goods came into his possession. *Id.*
3. There is no statute imposing upon railroad companies the absolute duty of furnishing feeding and watering pens so large that the cattle would receive no injury from being confined therein, and hence a charge imposing this duty would be reversible error. The true test seems to be whether the pens under all the circumstances were such as a person of ordinary prudence would have provided. *Chicago, R. I. & G. Ry. Co. v. Crenshaw,* 238.

Carriers of Passengers.

Effect of shock on other passengers. See *Evidence, 8.*

1. The derailment of a railway car warrants the presumption of negligence on the part of the railway company, and the presumption prevails until the derailment is otherwise accounted for. *San Antonio Trac. Co. v. Probandt,* 265.
2. It is the duty of a railway to stop its train at a station long enough to afford passengers in general opportunity to board same before starting it. If special circumstances of a passenger require longer time, the company is negligent in failing to afford it only where the circumstances or facts calling for inquiry are known to those operating the train. *St. Louis S. W. Ry. Co. v. Anderson,* 300.
3. A shipper of fish by express at a small station where there was no express office, having to load his fish on the express car, was injured by the starting of the train while he was attempting to board it to take passage. There was evidence making it a question of fact whether his intention to take passage thereon should have been anticipated by the train men. Held, that it was error to charge that defendant was negligent if the fact that plaintiff was a passenger could have been known to them by the exercise of a high degree of care. This required that they should ascertain his intention by inquiry irrespective of circumstances calling for such inquiry. *Id.*
4. A passenger was fatally injured while attempting to board a railroad train at a station by coming in contact with a baggage truck which an express company had negligently placed near the train; the express company had the right by written contract to use the depot grounds of the railroad company for the conduct of its business, but there was no agreement by the express company to indemnify the railroad company for losses resulting from such a state of facts. Held, the railroad company was not entitled to recover over against the express company the damages it was required to pay to the widow and heirs of the deceased passenger. The railroad company owed a duty to the deceased as its passenger to keep its platform in a safe condition; there was no contractual relation between the express company and the deceased. *Houston & T. C. R. Co. v. Wells-Fargo & Co.,* 241.

Cars.

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Cases Followed, Distinguished, Overruled, etc.

1. Logan v. Stephens County, 98 Texas, 283; Gallup v. Liberty County, 57 Texas Civ. App., 175; Ewing v. Duncan, 81 Texas, 230, and Waggoner v. Wise County, 17 Texas Civ. App., 220, followed. *Carter-Kelly Lumb. Co. v. County of Angelina,* 310.

Cases Followed, Distinguished, Overruled, Etc.—*Continued.*

2. Modern Order of Praetorians v. Hollmig, 100 Texas, 623, limited and distinguished. *Scottish U. & N. Ins. Co. v. Wade,* 632.
3. Gross v. Colonial Ass. Co., 56 Texas Civ. App., 627, distinguished from this case as involving a promissory warranty, not misrepresenting an existing fact. *Id.*
4. Speake v. White, 14 Texas, 365, and Willis v. Morrison, 44 Texas, 27, distinguished. *Baum v. McAfee,* 55.
5. Western Union Tel. Co. v. O'Keefe, 87 Texas, 423, distinguished. *Sanders v. Eastland Ind. Sch. Dist.,* 54.
6. DeCordova v. Rogers, 97 Texas, 60, followed. Ingram v. Maynard, 6 Texas, 131; Francis v. Northcote, 6 Texas, 186; Timmins v. Bonner, 58 Texas, 554; Heath v. Layne, 62 Texas, 694; Handy v. Woodhouse, 25 S. W., 40; Nicholson v. Harvey, 25 S. W., 458, distinguished. *Nicholson v. Nicholson,* 357.
7. Lakey v. Texas & P. Ry. Co., 33 Texas Civ. App., 44; Gulf, C. & S. F. Ry. Co. v. Howard, 97 Texas, 518; Gulf, C. & S. F. Ry. Co. v. Johnson, 47 Texas Civ. App., 74; Texarkana & Ft. S. Ry. Co. v. Anderson, 102 Texas, 402, distinguished; and Seery v. Gulf, C. & S. F. Ry. Co., 34 Texas Civ. App., 89; Texas & P. Ry. Co. v. Webb, 31 Texas Civ. App., 498, and other cases followed. *Freeman, Receiver, v. Shaw,* 294.
8. Pioneer Savings & Loan Co. v. Everheart, 18 Texas Civ. App., 192; Pioneer Savings & Loan Co. v. Paschall, 12 Texas Civ. App., 613; Bayless v. Standard Savings & Loan Co., 39 Texas Civ. App., 353, and Downard v. National Loan & Inv. Co., 22 Texas Civ. App., 570, distinguished. *Girardeau v. Perkins,* 553.
9. International & G. N. R. Co. v. Butcher, 98 Texas, 462; Missouri, K. & T. Ry. Co. v. Nesbit, 46 Texas Civ. App., 209, distinguished. *Receivers Kirby Lumber Co. v. Lloyd,* 489.
10. Harle v. Richards, 78 Texas, 80, distinguished. *Strong v. Elder & Sons,* 88.
11. Flemming v. Seeligson, 57 Texas, 531; Johnson v. Luling Mfg. Co., 24 S. W., 996, distinguished. *Dorroh v. Bailey,* 282.
12. Smith v. State, 54 Texas Crim., 298; Lee v. State, 54 Texas Crim., 382; Northern Texas Trac. Co. v. Danforth, 53 Texas Civ. App., 419, followed. *Rice & Lyon, Receivers, v. Lewis,* 274.
13. Bering Mfg. Co. v. Femelet, 35 Texas Civ. App., 36; Gulf, C. & S. F. Ry. Co. v. Newman, 27 Texas Civ. App., 77; Houston & T. C. Ry. Co. v. Strycharski, 35 S. W., 851, distinguished. *Texarkana & Ft. S. Ry. Co. v. Brandon,* 451. De La Vergne Rfg. Co. v. Stahl, 54 S. W., 40, distinguished. *Texarkana & F. S. Ry. Co. v. Brandon,* 451.
14. Rogers v. Watson, 81 Texas, 403, limited. *Girardeau v. Perkins,* 553.
15. Receivers of Kirby Lumber Co. v. Owens, 56 Texas Civ. App., 370, followed. Ott v. Johnson, 101 S. W., 534, overruled. *Rice & Lyon, Receivers, v. Lewis,* 273.

Cattle.

Duty to furnish feeding pens. See *Carriers of Goods, 3.*
Injury in transportation. See *Damages, 9, 13.*
Delay in movement of trains. See *Evidence, 17, 18.*

Causal Connection.

Between negligence and injury. See *Negligence, 3, 4; Railways, 7, 8.*

Certificate.

Priority of payment on sale of property. See *Receivers, 2-9.*

Certiorari.

To correct record on appeal. See *Practice on Appeal, 2, 3, 4.*

Change of Venue.

On sustaining defendant's plea. See *Plea of Privilege, 1.*

Character.

Disqualifying for position of trust. See *Contract, 10, 11.*
Of party assaulted. See *Evidence, 22.*
Put in issue by imputation of fraud. See *Evidence, 23.*

Children.

Backing train over crossing. See *Negligence, 16.*

Citation.

Supplied by parol proof. See *Judgments, 4.*

1. Defendants in trespass to try title disclaimed as to the land sued for unless it should be shown that the tract of land claimed by plaintiff conflicted with a tract bought and claimed by them under deed with covenant of warranty, in which event they pleaded not guilty, among other defenses, and for recovery over against the independent executors of their vendor, on said covenant of warranty; the executors were served with citations requiring them to appear and answer plaintiff's petition, although they were not named therein as defendants, and said citations, besides the statutory requirements, recited the filing of the answer of said defendants and the allegations therein contained made the basis of the plea over against the executors, and commanded the officer to serve said executors with a true copy of the petition and said answer, but did not in terms require the executors to appear and answer said plea over against them. Held, a judgment by default against the executors on the covenant of warranty of their testator, was void, although the judgment recited that said executors had been duly cited. *Bomar v. Morris*, 378.
2. It is well settled that judgment by default reciting service upon the defendant, rendered by a court of competent jurisdiction, can not be successfully attacked in a collateral proceeding by showing that there was no service; but it is as well settled that a judgment by default will be reversed on appeal unless the record contains a citation showing due service or an appearance by the defendant, even though the judgment contains a recital that the defendant was duly served with citation. *Id.*

Cities and Towns.

Assessment for street paving. See *Constitutional Law, 3.*
Acceptance of public street. See *Dedication, 1, 2.*
Condemnation for street purposes. See *Eminent Domain, 1.*

1. The special charter of the city of Paris, the ordinances passed thereunder prescribing the method of procedure for paving streets and assessing the benefits of the improvements against owners of lots thereon, and resolutions and proceedings of the city council for such assessment considered and held to show proceedings in accordance with such charter and ordinances. *City of Paris v. Brenneman*, 464.
2. A resolution providing for the paving of a portion of a street, which complied with all requirements of the charter and ordinances of the city in regard to the method of doing such work and assessing the benefits against lot owners, having been amended by a resolution adding other parts of the street to the portion to be paved, this was a sufficient adoption, as to the added part, of the procedure provided by the original resolution. *Id.*
3. The ordinances requiring an engineer's report to the council of the cost of improvements and property and owners to be benefited, with estimate of benefits, and the resolution for paving a certain part of a street requiring the making of such report, an amendment to the ordinance added a further portion of the street to the part to be paved under such resolution and a report of the engineer giving the cost, specifications, ownership, and estimated benefits, as to this added portion was made to the council. The requirement that this was to be ordered and made was complied with as to such portion added by the amendment, the failure to order the report before it was made being a harmless irregularity. *Id.*

City Ordinance.

Acceptance of terms by railway. See *Railways, 2.*

Claims.

Authentication of. See *Administration, 5, 6.*
Priority of payment. See *Receivers, 2-9.*

Collateral Attack.

Presumption as to jurisdiction. See *Administration, 2.*
Erroneous judgment good against. See *Judgment, 7.*
Injunction against judgment a direct attack. See *Taxation, 6.*

Collateral Security.

Creation of lien against homestead. See *Vendor and Purchaser, 9.*

Commission.

For sale of land. See *Contract, 2.*
For moneys expended. See *Guardian and Ward, 5.*

Commissioners' Court.

Ratification of illegal sale. See *County School Land, 1.*
Declaring result of election. See *Intoxicating Liquors, 1.*
Change in highway. See *Public Road, 2, 3.*

Common Carrier.

Of goods. See *Carriers of Goods, 1-3.*
Of passengers. See *Carriers of Passengers, 1-4.*

Common Source.

Parties claiming under. See *Trespass to Try Title, 2.*

Community Property.

Debts against community. See *Administration, 4.*
Conveyance by husband to wife. See *Husband and Wife, 4, 5.*

Concurring Negligence.

Of fellow servant. See *Master and Servant, 7, 29.*

Condemnation.

By city for street purposes. See *Eminent Domain, 1.*
Amendment of judgment. See *Judgment, 6.*

Condonation.

Of right to discharge employe. See *Fraud, 4.*

Connecting Lines.

Action against terminal carrier. See *Carriers of Goods, 2.*
Contract between. See *Railways, 3, 4.*

Consignor and Consignee.

Refusal to pay draft. See *Estoppel, 2.*
Election of remedies by seller. See *Sale, 2, 3.*
Refusal to receive and pay. See *Sale, 4.*

Constitutional Law.

Equality of taxation. See *Taxation, 3.*

1. The Act of March 27, 1903, Laws Twenty-Eighth Legislature, 94, 95, is not unconstitutional as depriving an insurance company of its property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States. *Scottish U. & N. Ins. Co. v. Wade*, 631.
2. The Act of March 27, 1903, Laws Twenty-Eighth Legislature, 94, 95, regulating contracts of insurance is not unconstitutional as depriving certain insurance companies of the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States, by an arbitrary classification of the companies subject

Constitutional Law—*Continued.*

to or exempt from the operation of the law. The classification is not that of companies, the Act applying equally to all, but of forms of contract, and furnishes on its face a sound reason for such classification. *Id.*

3. A city charter giving authority to pave streets and assess the cost against lots and lot owners as far as the property is benefited by the improvement, giving such owners the right to be heard thereon before the council but making its determination final, is not unconstitutional as a taking of property without due process of law (Const. U. S. Fourteenth Amendment); nor because jury trial was denied (Const. of Texas, art. 1, sec. 15), the assessment being a tax which was not required to be imposed by a jury; nor under the requirement that private property shall not be taken for public use without compensation (Const. of Texas, art. 1, sec. 17); nor because such procedure departs from the due course of the law of the land (Const. of Texas, art. 1, sec. 19); nor as infringing the requirement that the courts shall be open for redress of injuries (Const. of Texas, art. 1, sec. 15); the requirement that all taxes shall be equal and uniform (Const. of Texas, art. 8, sec. 1) this having no reference to assessment of benefits. *City of Paris v. Brenneman*, 464.

4. The Act of 1907 (Gen. Laws, 1907, page 447) concerning local option elections, is not obnoxious to the objection that it is violative of the Constitution because the extension of the time within which a local option election might be contested, is not comprehended in the caption. The caption is sufficient to embrace the subject matter of the Act. Nor does it affect any vested rights with respect to personal or property rights, and is not violative of that provision of the Constitution which forbids the passage of retroactive laws. *Coats v. Blanding*, 334.

Constitution Cited.

(Constitution of Texas.)

Article 1, sec. 8. Uniformity of taxation. *City of Paris v. Brenneman*, 472.
Article 1, sec. 13. Due process of law. *City of Paris v. Brenneman*, 472.
Article 1, sec. 17. Taking private property. *Baldwin v. City of San Antonio*, 264.
Article 1, secs. 15, 17, 19. Jury trial. *City of Paris v. Brenneman*, 472.
Article 3, sec. 56. Local or special laws. *Houston Elec. Co. v. Faroux*, 235; *Rice & Lyon, Receivers, v. Lewis*, 278.
Article 7, sec. 6. County school land. *Carter-Kelly L. Co. v. County of Angelina*, 315.
Article 16, sec. 20. Local Option. *Coats v. Blanding*, 337.
Article 16, secs. 50, 52. Homestead. *Strong v. Elder & Sons*, 90; *Girardeau v. Perkins*, 559.

(Constitution of United States.)

14th Amendment. Due process of law. *City of Paris v. Brenneman*, 471; *Scottish U. & N. Ins. Co. v. Wade*, 634.

Contagious Disease.

Exposure to by delay of telegram. See *Telegraph, 5, 6.*

Contested Elections.

When result becomes effective. See *Intoxicating Liquors, 1.*

Continuance.

1. A second application for continuance should show that the evidence desired can not be procured from any other source; failing in this it is addressed to the discretion of the court; and abuse of this did not appear where the testimony of the absent witnesses on a previous trial had been preserved and was permitted to be read in evidence from the stenographer's notes. *Sullivan-Sanford Lumb. Co. v. Cooper*, 536.

Continuance—*Continued.*

2. An application for continuance is treated as a second one, though the first, made at a former term, was overruled. *Id.*

Contract.

Conversion of mortgaged property. See *Damages, 1.*
Expense of preparing to carry out. See *Damages, 3.*
Discharge of employe. See *Damages, 4.*
Proof of meaning of technical words. See *Evidence, 4.*
Parol agreement modifying consideration. See *Evidence, 9.*
Dealings in futures. See *Gaming Transaction, 1.*
Disaffirmance by minor. See *Infancy, 1, 2.*
Indemnity against accident. See *Insurance, Accident, 1, 4.*
Indemnity against fire. See *Insurance, Fire, 1-5.*
Payment of dues. See *Insurance, Life, 1.*
Death in personal difficulty. See *Insurance, Life, 2, 3.*
Note payable without interest. See *Interest, 1.*
Note to secure future advances. See *Mortgage, 1.*
Action on express contract. See *Quantum Meruit, 1.*
Agreement between connecting lines. See *Railways, 3, 4.*
Election of remedies for breach. See *Sale, 1, 2, 3.*
Parol sale of land. See *Statute of Frauds, 1.*
Unrepeated message. See *Telegraph, 8.*
Sale of land. See *Vendor and Purchaser, 1-9.*
Selier's lien for price. See *Venue, 1.*
Action by endorsee. See *Venue, 2, 3.*
Parol evidence to alter. See *Written Instrument, 1.*

1. Evidence considered and held sufficient to show a completed contract in writing, by letters and telegrams for sale of a car load of cane seed. *Higgins Mill & El. Co. v. Gossett*, 136.
2. Pleading and evidence considered, and held to be based upon and to show an express contract to pay a certain commission for the sale of land. *Baum v. McAfee*, 55.
3. Where two or more men make a joint promise, each is liable to the promisee for the whole debt or liability. This is true in a joint obligation as well as in a joint and several obligation. *Id.*
4. The owner of lumber in H. county by contract in writing sold it to a purchaser in D. county, to whom it was to be shipped for a named price f. o. b. cars, the place of payment not being designated. Held, that it was not a contract to be performed by the buyer in H. county, so as to give venue there in a suit to which he interposed his plea of privilege. *Ogburn-Dalchau Lumb. Co. v. Taylor*, 442.
5. A contract for the delivery of lumber stipulated that it should be delivered on the purchaser's order "with as little delay as possible." In a suit upon the contract the court charged the jury that the obligor was bound to deliver the lumber "in a reasonable time" after receipt of the order. Held, that the expressions were equivalent and there was no error in the charge. *Cameron & Co. v. Matthews*, 118.
6. H. and C. entered into an agreement to buy the claim of one holding possession of a section of land under a void tax deed and to acquire title thereto by ten years' occupancy. H. was to pay one-tenth of the purchase money, and C. nine-tenths; H., being a lawyer, was to advise C. as to all steps necessary to be taken to acquire limitation title, and C. was to hold possession of the land; the deed was to be taken in the name of C. and at the end of ten years one-fourth of the land was to belong to H. and three-fourths to C.; the agreement was complied with in all respects by H., but C. repudiated the agreement when the title was perfected by limitation and claimed the entire section for himself. In a suit by H. against C. for his interest in the land, held, that the contract was not subject to the objections that it was inequitable because an attempt to acquire the property of another without paying therefor; that the contract was merely optional and not binding on C.; that H. paid nothing of value for the land; and that the contract contravened the statutes of fraud. It was error to sustain an excep-

Contract—*Continued.*

tion to the petition on said grounds. Nor did it appear that plaintiff's demand was stale. *Hammons v. Clwer*, 610.

7. Where a contract of employment does not stipulate any particular length of time or term of employment, either party would have a right to terminate it at any time. *Dunham v. Orange Lumb. Co.*, 269.

8. Acquiescence, to have the effect of an admission of the party to be affected thereby or to constitute a concurrence in what is being said or done by another, must exhibit some act of the mind and amount to voluntary demeanor or conduct of the party sought to be bound thereby; and it must plainly appear that such conduct was fully known or the language fully understood by such party before any inference of assent can be drawn from his silence. *Harris Millinery Co. v. Bryan*, 477.

9. The mere fact that the manager of a private corporation was present in the room when and where the attorney for the purchaser of goods from the corporation dictated to the bookkeeper of the corporation an agreement, endorsed on the invoice of the goods, that the goods were to be delivered by the corporation at the residence of the purchaser in another county, was not sufficient to support a finding that the manager heard and assented to the agreement as to the delivery of the goods, and hence insufficient to fix the venue in the county of the purchaser's residence in a suit for damages for failure to deliver the goods as per contract. *Id.*

10. One seeking and obtaining employment in a position of trust and confidence impliedly warrants that he is an honest man, and the discovery by the employer of the fact that he had obtained the employment by false representations showing a lack of moral qualities and untrustworthiness would be ground for his discharge though the representations did not relate to or affect the employer's business, and there had been no breach of contract by the employe. *Kelly Plow Co. v. London*, 208.

11. In an action for wrongful discharge of plaintiff from the position of manager of sales for an implement company with power to direct the movements of traveling salesmen and the prices of goods, which position plaintiff held under a contract for a fixed salary for five years, defendant alleged in answer that the position was obtained by false and fraudulent representations by plaintiff as to the salary he was then getting from his employer, a company engaged in similar business, and his standing in such company and the offers made by it for the purpose of retaining him in its service, and that he was discharged by defendant on learning of the falsity of such representations. Plaintiff excepted on the ground that the representations alleged were immaterial, in no way affecting defendant's business, which was not charged to have suffered in consequence. Held, that the exceptions were properly overruled. *Id.*

12. A merchant ordered from manufacturers 11,000 cards of needles with his advertisement printed on the cards. Before filling it, the latter, sending him a copy of his order, requested him to check it over carefully and make any changes or corrections desired, to which he replied: "I have checked this all over carefully and find it correct in every parparticular." Held, that the purchaser was bound to accept and pay for the quantity ordered, though he intended and understood the order to be for 11,000 needles and not for 11,000 cards of needles. *Shrimpton Mfg. Co. v. Brin*, 352.

Contributory Negligence.

Dangerous manner of doing work. See *Evidence, 21.*
Burden of proof. See *Instructions to Juries, 28.*
Permitting Johnson grass to mature. See *Instructions to Juries, 30.*
Ignoring issue. See *Master and Servant, 4.*
Warning servant ignorant of danger. See *Master and Servant, 19-22.*
Evidence insufficient to show. See *Master and Servant, 26.*
By fellow servant. See *Master and Servant, 7-29.*

Contributory Negligence—*Continued.*

Acting under orders. See *Master and Servant, 31.*
Continuing employment with knowledge of defect. See *Master and Servant, 33.*
Promise to repair defect. See *Master and Servant, 34, 35.*
Statute on assumed risk. See *Master and Servant, 36.*
Question, one of fact. See *Negligence, 5, 7.*
Becoming a question of law. See *Negligence, 6.*
Continuing service with knowledge of defect. See *Negligence, 8.*
Lying insensible upon railway track. See *Negligence, 9-13.*
Tested by circumstances and danger. See *Negligence, 15.*
Permitting child to wander upon railway track. See *Negligence, 16.*
Driver assuming he had time to cross railway. See *Negligence, 17.*
Knowledge of approach of train. See *Negligence, 18.*
Boiler explosion by improper management. See *Negligence, 19, 20, 21.*

Conversion.

Measure of damages. See *Damages, 1.*

1. In an action for conversion of plaintiff's stock of goods by defendant, who held them under a contract which he claimed to be an absolute sale in discharge of plaintiff's debt to him, the latter claiming it to have been a mortgage, no charge requiring proof of conversion by defendant was necessary. The nature of the claim asserted by him amounted to conversion if the contract was found to be a mortgage. *Payne v. Lindsley,* 545.

Conveyance.

See, generally, *Deeds; Fraudulent Conveyance; Homestead; Husband and Wife; Vendor and Purchaser.*

Corporations.

Authority of bank cashier. See *Administration, 5.*
Permit to do business. See *Foreign Corporation, 1.*
Notice to officers or directors. See *Gaming Transaction, 1.*

1. Where a mortgage of the assets of a corporation is foreclosed, and the purchasers for the purpose of managing the property and taking to themselves the necessary corporate franchises, organize a new corporation, this, not being a continuation of the old organization, is not liable for its debts or bound to perform its obligations unless such liability has been assumed by contract or has been imposed by an operative statute. *Bigham Bros. v. Port Arthur Canal & Dock Co.,* 367.

Costs.

Incurred in receivership of railway. See *Receivers, 2-9.*

1. Under the provisions of article 1438, Rev. Stats., the trial court may for good cause, to be stated on the record, adjudge the costs of the case against the successful party. What constitutes good cause is left largely to the discretion of the trial court. The action of the court in so adjudging the costs upheld in a case where the plaintiff's own carelessness and dereliction of duty necessitated the issuance and perpetuation of a writ of injunction against opening a public road. *Pickerell v. Irby,* 52.

Counterclaim.

As affecting jurisdiction. See *Amount in Controversy, 2.*
Offsetting assault with assault. See *Offset, 1, 2.*

Counties.

Sale of school land. See *County School Land, 1.*

County Court.

Jurisdiction on appeal. See *Amount in Controversy, 5; Appeal, 1, 4.*
Amendment of judgment. See *Judgment, 6.*
Amendment on appeal. See *Practice on Appeal, 6.*

County School Land.

1. A Commissioners' Court made an order appointing and directing the county judge "to sell and to make good and sufficient title to the purchaser or purchasers of all or any portion of said land (the county school land) or timber," and providing that the timber, if it should be sold separately from the land, "should be sold for not less than the regular customary price for same, and the purchase price of said timber only shall be paid in cash." Acting under this order the county judge sold the timber growing upon the land, receiving a cash consideration therefor which was paid into the permanent school fund of the county and afterwards, by order of the Commissioners' Court, was invested in interest-bearing bonds, the interest upon which was annually collected by the county and used for the benefit of its public schools. A few days after the sale was consummated the county judge duly reported the same to the Commissioners' Court then in regular session, and a majority of the court approved and confirmed the sale, but no order of approval or confirmation was entered in the minutes of the court. Held (1) the sale of the timber was illegal only in the manner in which it was made; (2) the attempted sale by the county judge as agent for the county was an act which the Commissioners' Court could ratify; (3) that by the acceptance and use of the money and the approval of the sale, the said court ratified the same; and (4) the failure to enter the order of approval in the minutes of the court did not prevent the action of the court from having the effect of a ratification. *Carter-Kelly Lumb. Co. v. County of Angelina*, 310.

Courts, Commissioners.

Ratification of illegal sale. See *County School Land, 1.*
Declaring result of election. See *Intoxicating Liquors, 1.*
Change in highway. *See Public Roads, 2, 3.*

Courts, County.

Jurisdiction on appeal. See *Amount in Controversy, 5; Appeal, 1, 4.*
Amendment of judgment. See *Judgment, 6.*
Amendment on appeal. See *Practice on Appeal, 6.*

Courts, District.

Property rights of husband and wife. See *Divorce, 1.*
Contested election. See *Intoxicating Liquors, 1.*

Courts, Justice.

Damages beyond jurisdiction. See *Amount in Controversy, 3, 4.*
Jurisdiction to be shown by record. See *Appeal, 1, 3, 4.*
Entries on docket. See *Pleading, 3; Practice on Appeal, 6.*

Covenants.

Vouching in warrantor. See *Citation, 1.*

Crops.

Injury by oil from pipe line. See *Damages, 6; Negligence, 22.*
Overflow and Johnson grass. See *Damages, 7, 8.*

Cross-Action.

Offsetting assault by assault. See *Offset, 2.*

Cross-Examination.

1. Where a plaintiff on the second trial of a cause had changed his testimony as to certain material dates, it was permissible for the defendant to ask him on cross-examination if he had not changed his testimony as to said dates because on the first trial the jury had returned a verdict against him. The mere fact that the result of the first trial would thus incidentally be made known to the jury would not warrant the court in denying the defendant the right to prove that the

Cross-Examination—*Continued.*

plaintiff had changed his testimony in the belief that the verdict would also be changed. The broadest latitude should be allowed on cross-examination of an interested witness. *Knights of Mod. Maccabees v. Gillis*, 110.

Crossings.

Collision with train at. See *Negligence, 17, 18.*
Killing live stock at. See *Railways, 8.*

Damages.

For wrongful discharge from employment. See *Evidence, 11.*
Opinion as to amount of. See *Evidence, 19.*
For diminished earning capacity. See *Pleading, 9.*
Complaint of excessive verdict. See *Practice on Appeal, 14.*
Notice of claim for. See *Telegraph, 3.*
Exposure to infectious disease. See *Telegraph, 5, 6.*
Breach of contract for sale. See *Vendor and Purchaser, 8.*

1. In an action for conversion of mortgaged property by the mortgagee, who claimed that the contract was one of absolute sale, the measure of damages was the value of the goods at the time they were transferred less the debt. *Payne v. Lindsley*, 545.
2. The reasonable value of the owner's time in caring for and protecting his rafts and logs while detained in a navigable stream by the unlawful obstruction of the same, is a proper item of expense and therefore recoverable against the party causing the obstruction. *Orange Lumb. Co. v. Thompson*, 562.
3. For the purpose of carrying out a contract to reclaim stranded and sunken logs, plaintiff at his own cost built a boat especially adapted to such work; in a suit by the plaintiff for damages for a breach of the contract by defendant in refusing to permit him to reclaim all the logs, the court charged the jury upon the measure of plaintiff's damage that in arriving at the amount of profit plaintiff may have made, all the expense of building the boat should be taken into account along with other expenses of carrying out the contract, to be deducted from the amount to be realized from the work. Held, error. The expense of building the boat was not a part of the expense of carrying out the contract and earning the price, which was saved to plaintiff by stopping the work, and which must be deducted from the price in estimating the profits. The reasonable value of plaintiff's personal services rendered in carrying out the contract would be a proper item to be deducted from the profits. *Dunham v. Orange Lumb. Co.*, 268.
4. The action being for wrongful discharge of an employe under a contract of five years' service and who had thereafter obtained other employment for a like term at a less compensation, it was improper to charge that the measure of damages, the five years not having expired, would be the difference in the compensation under the respective contracts. Other matters, such as the character of the two contracts, the situation of the parties, uncertainty of life or ability to perform, prospects for promotion, etc., should be considered; and not the difference in wages to be earned, but the value of such difference as a present payment should be considered, where the compensation was for loss of a contract having several years of performance yet to run. *Kelly Plow Co. v. London*, 209.
5. In a suit for the value of a house set on fire and destroyed by trespassers, the measure of damage would be the difference between the value of the premises just before and just after the destruction of the house. Where the house was old, testimony as to the price of new lumber would be irrelevant. *Wetzel v. Satterwhite*, 1.
6. The measure of damages for injury to grass and cornstalks on plaintiff's land was the value of the things destroyed; that for injury to the turf and soil the difference in value of the land before and after the injury, irrespective of the value of the grass, etc., destroyed. See

Damages—*Continued.*

charge on subject held to permit recovery of double damages. *Gulf Pipe Line Co. v. Brymer*, 40.

7. Where the injury by wrongful flooding of plaintiff's land consisted in impairment of the productiveness of a perennial growth thereon, such as alfalfa, the measure of damages was the difference in the value of the land before and after the injury was inflicted; and so, also, as to its like impairment by the washing upon it and growth thereon of the seeds of Johnson grass. *Missouri, K. & T. Ry. Co. v. Malone*, 254.
8. The allowance of the value of the crop destroyed in a given year and of the depreciation of the value of the land by injury to its future productiveness, was proper, and not a double recovery. *Id.*
9. Evidence stated and held sufficient to warrant the court in assuming in its charge to the jury that there was no market value for the cattle in question at their destination, and to use their intrinsic value in estimating plaintiff's damage. *Missouri, K. & T. Ry. Co. v. Wasson Bros.*, 239.
10. Where there is no market value for live stock at their destination, their intrinsic value should be used in estimating the damage inflicted during a shipment, and not their market value at the nearest market. *Id.*
11. Damages being claimed for injury to cattle both by failure to furnish cars at the time agreed and by delay and bad handling in their transportation, an instruction which made the measure of damages in case of recovery the difference between the value at destination when delivered and the same at the time they should have been delivered according to contract, was erroneous in permitting a recovery of damages under both issues upon proof sustaining either. *Galveston, H. & S. A. Ry. Co. v. Noelke*, 347.
12. Where there is proof of damages in excess of those alleged, recovery should be limited by the instructions to the amount pleaded. *Id.*
13. Where delay in transportation of live stock to market was claimed to have caused loss by decline in the market, defendant was entitled, upon proof making such instructions appropriate, to a requested charge disallowing such decline from the market price of a previous day if the cattle, transported in proper time, would not have reached destination in time to be put on the market on that day. *Id.*
14. Where a parent sued to recover damages sustained by reason of the death of his minor son, and for nothing more, he can not complain that the charge of the court denied him a recovery for loss of time by the son during his illness resulting from injury, and expenses incurred by the plaintiff for medical treatment for the son. *Dye v. Chicago, R. I. & G. Ry. Co.*, 614.
15. In a suit for damages for personal injuries the court charged the jury as follows: "If you find a verdict for plaintiff you will assess his damages at such sum of money as, if paid in hand at this time, will fairly and justly compensate him for the injuries alleged in his petition which you find from the evidence he sustained, if any; and in doing so you will take into account the mental and physical pain, if any, suffered by him up to this time and that will be suffered by him in the future as a result of said injuries, if any; the earning capacity lost by him on account thereof, if any; and the impairment of his ability to earn money in the future, if any, on account of said injuries." Held, not subject to the objection that it allowed a double recovery for the same result. International & G. N. R. Co. v. Butcher, 98 Texas, 462, and Missouri, K. & T. Ry. Co. v. Nesbit, 40 Texas Civ. App., 209, distinguished. *Receivers Kirby Lumb. Co. v. Lloyd*, 489.
16. Evidence as to injuries to an arm considered and held sufficient to support a verdict for $7,922. *Atchison, T. & S. F. Ry. Co. v. Seeger*, 526.
17. Evidence considered and held to support a recovery of $1,500 as damages for personal injury to a laborer in a railway round house scalded by hot water from an engine. *Texarkana & F. S. Ry. Co. v. Brandon*, 452.
18. A recovery of $7,500 sustained as not excessive in case of painful and

Damages—*Continued.*

permanent injuries to a brakeman, a young man earning $100 per month and in line for promotion. *International & G. N. R. Co. v. Clark*, 82.

19. A verdict for $9,500 in favor of a boy ten years old for the loss of both feet is not excessive. *Texas & N. O. R. Co. v. Buch*, 304.

Dangerous Machinery.

Failure to warn servant. See *Master and Servant, 18-21.*
Servant's ignorance of danger. See *Master and Servant, 25, 26, 30.*

Death.

Pleading damages incurred. See *Damages, 14.*
Received in personal difficulty. See *Insurance, Life, 2, 3.*
By negligence of vice-principal. See *Master and Servant, 24.*
By negligence of incompetent fellow-servant. See *Master and Servant, 25.*
Proof of causal connection. See *Negligence, 3, 4.*
Revocation of agency by death. See *Powers, 5, 6, 8.*

Declarations.

Of vendor of land. See *Evidence, 12.*
Contemporaneous statement. See *Evidence, 13.*

Dedication.

Way across vacant lot. See *Easement, 1.*

1. The existence and record for more than sixty years of maps of a city which during that time were generally recognized as correct maps of the city as it was originally laid out, and the fact that the successors in title of the original owner of the land on which the city is situated have during that time recognized and referred to said maps and the streets thereon shown in the sale and conveyance of lots and blocks in said city, are sufficient to sustain a conclusion that the streets shown on the map had been irrevocably dedicated to the public by the original owner of the land, although there was no direct evidence to that effect. *Pullman v. City of Houston*, 48.
2. When, by reason of the sale of lots and blocks by reference to the map of a city, the right is vested in the purchasers to have streets shown thereon opened, an acceptance by the city authorities is not necessary to complete the dedication. *Id.*

Deeds.

Recitals of previous conveyance. See *Evidence, 6.*
Intended as mortgage. See *Foreclosure, 1.*
Conveyance by insolvent debtor. See *Fraud, 3; Fraudulent Conveyance, 2, 3.*
Conveyance of exempt property. See *Fraudulent Conveyance, 1.*
Of homestead after death of wife. See *Homestead, 4.*
Of homestead without wife joining. See *Homestead, 5.*
Continued possession of grantor. See *Homestead, 6.*
To discharge lien and taxes. See *Homestead, 7.*
Of trust upon homestead. See *Homestead, 8-12.*
Abandonment after conveyance. See *Homestead, 13, 14.*
By husband to wife. See *Husband and Wife, 4, 5.*
By husband in trust for wife. See *Husband and Wife, 6.*
Unrecorded conveyance. See *Innocent Purchaser, 1, 2.*
Possession as notice of. See *Notice, 2, 3, 4.*
Parol evidence to alter. See *Written Instrument, 1.*

1. By a deed the owner of land sold and conveyed "all the pine timber twelve inches in diameter at the stump, now standing, growing and being situated upon" the land, the purchaser to have ten years in which to cut and remove the timber. Held, the purpose of the contract was to convey to the purchaser all pine timber of the dimensions

Deeds—*Continued.*

of twelve inches and over at the stump, and not merely such timber as was exactly twelve inches. *Havard v. Carter-Kelly Lumb. Co.*, 103.

2. A deed conveying land by metes and bounds sufficient to identify its location is good though it omits reference to the original grant from the State of which it forms a part. *Plummer v. Marshall*, 650.

3. A deed to land began, "State of Texas, Anderson County;" it was acknowledged for record before the county clerk of Anderson County and was duly recorded in the deed records of that county; there was at that time in that county a survey of the same name and area as that conveyed by the deed and bounded by adjacent surveys as set out in said deed, but the deed in question did not name the State or county in which the land was situated. Held, that the deed was properly admitted in evidence over an objection that it did not describe the land therein mentioned with sufficient certainty to identify it, and therefore could not form the basis for title by limitation. *Bond v. Garrison*, 620.

Default.

Recital of service in judgment. See *Citation, 2.*

Defective Machinery.

Concurring negligence of fellow servant. See *Master and Servant, 8.*
Servant's care to discover. See *Master and Servant, 30.*
Master's knowledge of defect. See *Master and Servant, 32.*
Continuing service with knowledge. See *Master and Servant, 33, 35, 36.*
Master's promise to repair. See *Master and Servant, 34.*
Proof of causal connection. See *Negligence, 3.*
Contributory negligence. See *Negligence, 6, 8, 19, 20, 21.*

Delay.

Agreement as to time of delivery. See *Contract, 5.*
In transportation of cattle. See *Evidence, 17, 18.*
In delivering message. See *Telegraph, 5, 6.*

Delivery.

Agreement as to time. See *Contract, 5.*
Agreement as to place. See *Contract, 9.*

Demurrer.

Showing error in ruling on. See *Briefs, 2.*
Amending to meet special exceptions. See *Pleading, 2.*
Sufficiency of description of land. See *Pleading, 6.*
Failure to ask ruling on. See *Practice in Trial Court, 1.*
To evidence. See *Practice in Trial Court, 2.*

Derailment.

Presumption of negligence from. See *Carriers of Passengers, 1.*
Assumed risk and contributory negligence. See *Negligence, 7.*

Description.

Omission of name of survey. See *Deed, 2; Judgment, 5.*
Sufficient to form basis for limitation. See *Deed, 3.*
General designation of metes and bounds. See *Limitation, 7.*
Objection to by demurrer. See *Pleading, 6.*
Of land in assessment for taxes. See *Taxation, 1, 2, 4, 5.*
Defect not apparent on face of judgment. See *Trespass to Try Title, 3.*

Devise.

Right to sue for property. See *Administrator, 1.*

Director.

Notice to. See *Gaming Transaction, 1.*

Disability.

Disaffirmance of contract with minor. See *Infancy, 1, 2.*

Disaffirmance.

Of contract by minor. See *Infancy, 1, 2.*

Discharge.

Condonation of employe's fault. See *Fraud, 4.*

Discovered Peril.

Assuming that peril was realized. See *Instructions to Juries, 4.*

Discretion.

In taxation of costs. See *Costs, 1.*
In control of argument. See *Practice in Trial Court, 3.*

District Court.

Property rights of husband and wife. See *Divorce, 1.*
Contested election. See *Intoxicating Liquors, 1.*

Divorce.

Jurisdiction over property rights. See *Husband and Wife, 2, 3.*

1. Where a divorce is refused the court is left without power to adjust the property rights of husband and wife. *Burns v. Burns,* 549.

Dormant Judgment.

Action on. See *Judgment, 4.*

Easements.

Use of way across vacant lot. See *Estoppel, 1.*

1. Evidence to show an easement in plaintiff upon a lot conveyed by him to defendant for its use for access to his own adjoining lot and as an alley or passway for the public, considered and held insufficient to show such easement either by dedication, prescription or estoppel, and which warranted a peremptory instruction for defendant. *Sutor v. International & G. N. R. Co.,* 73.
2. Use of a vacant city lot by pedestrians in "cutting across lots" between certain points, could not be considered adverse to the owner where there was no evidence that it was done in the assertion of a right. *Id.*

Elections.

Extension of time for contest. See *Constitutional Law, 4.*
Declaration of result. See *Intoxicating Liquors, 1.*

Election of Remedies.

Refusal of buyer to receive and pay. See *Sales, 2, 3.*

Eminent Domain.

1. A city by proper and regular proceeding condemned a strip of land for street purposes; the owners of the land appealed from the award; the city made the deposit and executed the bond required by law and took possession of the land in controversy; upon trial of the appeal in the County Court a verdict was rendered against the city for a larger amount than the commissioners awarded. Held, that the owners were entitled to interest at the legal rate only on the difference between the amount of the award and the amount of the verdict from the date the city took possession of the land. *Baldwin v. City of San Antonio,* 262.

Equity.

Adjustment on foreclosure. See *Foreclosure, 2.*
Restoration of possession. See *Injunction, 1, 4.*
Absence of legal remedy. See *Injunction, 2, 7.*
Irreparable injury. See *Injunction, 3.*
Temporary restraining order. See *Injunction, 5.*

Error.

Not ground for reversal. See *Harmless Error, 1, 2.*
Charge on weight of evidence. See *Instructions to Juries, 9.*
Erroneous charge. See *Instructions to Juries, 23.*
Correction of, on appeal. See *Practice on Appeal, 1-17.*

Estates of Decedents.

Administration upon. See *Administration, 1-6.*
Right to sue for property. See *Administrator, 1.*
Resignation of executor. See *Executors, 1.*
Surviving husband. See *Homestead, 2.*
Construction of will. See *Wills, 1.*

Estoppel.

To claim way over another's property. See *Easement, 1.*
By acquisition of another homestead. See *Homestead, 5.*
From seeking abatement of nuisance. See *Nuisance, 5.*

1. One permitting without objection the owner of a lot adjoining his own to let same to a tenant for building, and the tenant to erect a permanent and valuable brick building thereon, would seem to be estopped from subsequently asserting against them an easement in the lot requiring the removal of such building. *Sutor v. International & G. N. R. Co.*, 73.
2. When a consignee, at the time he refuses to pay a draft for the contract price of a shipment of freight, assigns one reason for the refusal, he may be estopped to assign a different reason thereafter when sued for the breach of his contract. *Zeigler v. Gerlach & Bro.*, 96.

Evidence.

Burden of proving lack of jurisdiction. See *Administration, 2.*
Burden of proof in change of water course. See *Boundaries, 4.*
Showing error in rulings on. See *Briefs, 3, 4.*
Showing evidence to be procured. See *Continuance, 1.*
Inference of assent from silence. See *Contract, 8, 9.*
Change in testimony by witness. See *Cross-Examination, 1.*
Admissions by husband as wife's agent. See *Husband and Wife, 1.*
Contradictory statements by witness. See *Impeachment of Witness, 1, 2.*
Charge on burden of proof. See *Instructions to Juries, 28, 29.*
Proofs of death by insured. See *Insurance, Life, 1.*
Contents of lost citation. See *Judgment, 4.*
Conflicting testimony. See *Juries, 2.*
Admissions made by servant. See *Master and Servant, 6.*
Reputation as to care. See *Master and Servant, 12.*
Burden of proving negligence. See *Master and Servant, 13.*
Value of property. See *Nuisance, 4.*
Proof outside of record. See *Practice on Appeal, 5.*
Objections not made on trial. See *Practice on Appeal, 11.*
Showing testimony objected to. See *Practice on Appeal, 12.*
As to amount of damages. See *Practice on Appeal, 14.*
Burden of proving negative. See *Railways, 6.*
Showing causal connection. See *Railways, 7.*
Objection on ground of variance. See *Variance, 1.*
Parol to alter writing. See *Written Instrument, 1.*

1. The trial court had no authority to reject testimony because of contradiction in it. It is the province of the jury to reconcile such contradictions. *Atchison, T. & S. F. Ry. Co. v. Seeger*, 526.
2. The testimony of an attorney to the effect that his client understood an ex parte deposition made by him, would not be subject to the objection that it was a confidential communication. *Sarro v. Bell*, 152.
3. Proof of the execution of a written instrument attested by subscribing witnesses can not be made by evidence of the handwriting without showing that the testimony of such subscribing witnesses can not be had. *Hightower Bros. v. W. F. Taylor Co., Ltd.*, 647.

Evidence—*Continued.*

4. Parol evidence is admissible to show the technical or special meaning of words used in a written contract, as "shipping instructions" in a contract of sale. *Higgins Mill & El. Co. v. Gossett*, 136.
5. In a suit against trespassers for the value of a house burned by them, the owner may give oral testimony as to his ownership. *Wetzell v. Satterwhite*, 1.
6. The recitation in a deed that a part of the same tract of land had been conveyed by a prior owner to a third party, is not competent evidence of that fact. *Bond v. Garrison*, 620.
7. In proper cases abandoned pleadings are competent evidence against the pleader. *Austin v. Jackson Trust & Sav. Bank*, 155.
8. On the question whether a passenger seated in a railway coach which was derailed received any serious injuries thereby, evidence as to the effect of the shock on other passengers, seated or standing, was admissible to show the extent of the jar. *Kelly Plow Co. v. London*, 209.
9. Though a written contract showed the compensation for services agreed on, evidence of a parol agreement that a part thereof was to be returned was admissible. *Id.*
10. The admission of a part of the contents of letters not necessary to an understanding of the portions thereof relevant to the issues was unwarranted, but is held harmless and not ground for reversal. *Id.*
11. In an action for damages by wrongful discharge of plaintiff, evidence of the salary he was receiving from another employer four years previously and of the salary offered by the employer to another to take his place after his discharge was irrelevant and improperly admitted. *Id.*
12. Where, in trespass to try title, the defendant claimed the land under a verbal sale to him, testimony as to the declaration of the vendor, not made in the presence of the vendee, to the effect that the vendee was looking after the property of the vendor, that there were no incumbrances on the same and that he had never made a deed to it, was hearsay and inadmissible. *Openshaw v. Dean*, 499.
13. Where a plaintiff, in a suit for damages for personal injuries, denied making certain statements under such circumstances as constituted them part of the res gestae, it was error for the trial court to limit by its charge the effect of the testimony of other witnesses, as to the fact that said statements were made, to the impeachment of the plaintiff. Said declarations were evidence of the truth of the facts stated therein. *Receivers Kirby Lumb. Co. v. Lloyd*, 489.
14. Witnesses should not be permitted to give their opinions in answer to hypothetical questions which embrace facts not supported by the evidence. *Galveston, H. & S. A. Ry. Co. v. Noelke*, 347.
15. A witness who testified that he could not, after four years, remember the exact words of the conversation with plaintiff, may still be permitted to state that he did not make a certain statement or give a certain promise at that time. *Id.*
16. In matters involving expert knowledge, a wide range is given to opinion testimony, extending even to the very issue on trial, but the expert's opinion is not binding on the jury. *Missouri, K. & T. Ry. Co. v. Howell*, 250.
17. In explanation of delay in starting from a station a train loaded with cattle for transportation, the division superintendent, an expert, should have been permitted to testify that incoming passenger trains, not arrived, had right of way over the outgoing freight and prevented its being sooner started. *Id.*
18. In excuse for delay in transportation of cattle, it was competent for the defendant to show its usual course of business, as that it did not run freight trains on Sunday over that part of the road, the sufficiency of the excuse being for the jury. *Id.*
19. A witness can not be permitted to give his opinion as to the amount of damage suffered by defendant (injury to his land by washing caused by overflow). He should state the facts, including market value before and after the injury, the amount to be determined by the jury under

Evidence—*Continued.*

proper instructions as to the measure. *International & G. N. R. Co. v. Fickey*, 133.

20. The probability of a person acting in a certain way under given circumstances is not a question on which opinion evidence is receivable. *Freeman, Receiver, v. Taylor*, 79.
21. A servant employed about a pile driver was killed by the descending hammer slipping past the head of the pile, which had got out of line, and striking a stick with which he was trying to push the pile back into place. Issue being raised as to his contributory negligence in using the stick for such purpose in a certain manner after being warned of the danger in so doing, it was improper to permit a witness to give his opinion as to the probability of deceased so doing after receiving such warning. *Id.*
22. In an action for damages by assault and battery, proof of the quarrelsome character of the party assaulted is admissible only on the issue of self-defense, and is confined to general reputation known to defendant. *McCormick v. Schtrenk*, 139.
23. The issue being whether plaintiff had been ruptured and injured by the derailment of a street car on which he was a passenger, or whether such injuries existed prior to the derailment and arose from other causes than the derailment, as alleged by defendant, the court properly permitted the plaintiff to introduce evidence of his general reputation for truth and veracity, honesty and fair dealing. *Houston Elec. Co. v. Faroux*, 232.
24. The issue being whether the rupture from which plaintiff suffered was caused by the derailment of a street car on which he was a passenger or had existed before that time, and a doctor having testified for defendant that plaintiff manipulated and reduced the rupture in the doctor's presence on the day following the accident, and that such manipulations required skill and practice, it was not reversible error to refuse to permit the doctor to testify further that plaintiff reduced the rupture as one familiar with such an operation. *Id.*
25. It is generally permissible to ask a witness a leading question for the purpose of ascertaining whether the witness is qualified to testify about the matter in issue. *El Paso & S. W. Ry. Co. v. Welter*, 23.
26. The generally applied test in determining whether or not a question is leading, is, does the question suggest the desired answer? *Id.*
27. The issue being whether or not plaintiff's grass was burned by sparks from defendant's engine, and the defendant having proved that all of its engines were equipped with the same spark arrester, which was described as being the latest and most improved to date, it was not error to permit the plaintiff to prove that other engines belonging to defendant had thrown sparks at other times along defendant's right of way. *Texas & P. Ry. Co. v. Wooldridge & Hardy*, 385.

Execution.

Effect of bankruptcy proceedings. See *Bankruptcy, 1, 2.*
Mandamus to compel issuance. See *Intervention, 2.*

Executor.

Sale of property by. See *Powers, 2, 3.*
Construction of powers of. See *Wills, 1.*

1. It seems that the mere filing of an application by executors to resign their trust would not divest them of their powers as executors; such effect would only be produced when the court had granted the application. *Wisdom v. Wilson*, 593.

Exemption.

Conveyance of homestead. See *Fraudulent Conveyance, 1.*
Homestead exemption. See *Homestead, 1, 2, 3.*

Expert.

Meaning of technical terms. See *Evidence, 4.*

Expert—*Continued.*
Explaining delay in train. See *Evidence, 17.*
Harmless error in exclusion. See *Evidence, 24.*

Express Company.
Passenger injured by negligence of. See *Carrier of Passengers, 4; Master and Servant, 1.*

Fellow Servant.
Concurring negligence of. See *Master and Servant, 7, 8, 29.*
Engaged in operating car. See *Master and Servant, 9.*
Direction of vice-principal. See *Master and Servant, 10-11.*
Reputation of, for care. See *Master and Servant, 12.*
Negligence of vice-principal. See *Master and Servant, 24.*
Employing incompetent servant. See *Master and Servant, 25, 26.*
Knowledge of servant's incompetency. See *Master and Servant, 27, 28.*

Fences.
Stock killed by railway. See *Instructions to Juries, 11, 12, 13; Railways, 5-8.*

Filing.
Transcript in appellate court. See *Appeal, 5; Injunction, 8.*

Final Judgment.
Declaring result of election. See *Intoxicating Liquors, 1.*
Acting against partnership. See *Judgment, 2.*
Dismissal as to insolvent party. See *Judgment, 3.*

Findings.
Exceptions to. See *Practice on Appeal, 1.*
Of master in chancery. See *Receivers, 5, 6.*
Submission of special issues. See *Special Issues, 1-4.*
1. Failure of the court to make findings of fact and law, though the record show a request that he do so, is not ground for reversal in the absence of a bill of exceptions reserved on such failure. *Kemp v. Everett*, 399.
2. Though the statute gives the judge ten days after adjournment in which to file his conclusions, Act of May 14, 1907, Laws Thirtieth Leg., p. 445, and bills of exception could only be filed in term time unless by order entered on the docket granting time after adjournment, it seems that the judge would have power to allow such bill after adjournment, the default complained of not occurring during the term. *Id.*

Fire.
Destruction of house by trespasser. See *Damages, 5; Trespass, 1, 2.*
Communicated by railway engine. See *Evidence, 27; Railways, 9, 10, 11.*
Action by owner of crops. See *Parties, 1.*

Foreclosure.
Purchaser at sale. See *Corporation, 1.*
Error not ground for reversal. See *Harmless Error, 2.*
Unrecorded deed. See *Notice, 2.*
Priority of claims in receivership. See *Receivers, 2-9.*
Of lien for purchase money. See *Vendor and Purchaser, 9.*
1. R being indebted to O on December 14, 1899, executed to him an absolute deed to several town lots; the deed was mutually understood and intended to be a mortgage; on January 16, 1900, R executed to O a note for the indebtedness and a deed of trust on the same lots to secure the note; afterwards again, a parol sale of the lots was made by R to O in satisfaction of the indebtedness, and O filed his absolute deed for record on August 24, 1904, and went into possession and made permanent and valuable improvements; on August 26, 1904, R executed a deed to the

Foreclosure—*Continued.*

same lots to his daughter; R died on March 18, 1905; in a suit of trespass to try title by the daughter against O for the lots, held (1) that a cross action by O setting up the note and deed of trust and paying for a foreclosure of the lien, filed more than seven years after the maturity of the note, was barred by limitation; (2) upon plaintiff's interposing the statute of limitation defendant had the right to have the trustee sell the lots under the deed of trust, and, upon obtaining a deed from the trustee, to plead by amended answer the title so acquired; and (3) the fact that defendant first sought to have his lien foreclosed by the court would not prevent him from afterwards having the same foreclosed by the trustee's sale, pleading the same. *Openshaw v. Dean*, 498.

2. In a suit of trespass to try title wherein the defendant set up title in himself under a foreclosure sale by the trustee in a deed of trust, facts considered and held to require the application of the general principles of equity whereby the creditor should account for the rents received, and have payment of any balance due on the original debt and compensation for improvements made. *Id.*

Foreign Corporation.

1. The statute concerning a permit to do business (Art. 745, Sayles' Civ. Stats.) applies only to those foreign corporations "desiring to transact business in this State, or solicit business in this State, or establish a general or special office in this State," hence in a suit by a foreign corporation upon a promissory note, the petition would not be subject to exceptions on the ground that it contained no allegation that the plaintiff corporation came within the class forbidden to prosecute suits in the courts of this State without a permit. *Geiser Mfg. Co. v. Gray*, 617.

Foreman.

Standing as vice-principal. See *Master and Servant, 10, 11, 24.*
Duty to warn of danger. See *Master and Servant, 16, 17, 20, 21.*
Acting under direction of. See *Master and Servant, 23; Pleading*, 7, 8.

Forfeiture.

Death in personal difficulty. See *Insurance, Life, 2, 3.*

Fraud.

On jurisdiction. See *Amount in Controversy, 5.*
Husband's control of proceeds of property. See *Homestead, 14, 15.*
Attorney's knowledge of. See *Notice, 1.*
Verbal sale of land. See *Statute of Frauds, 1.*

1. An insolvent debtor has the legal right to pay certain of his creditors in full and leave others unpaid, and to sell property with such intent and purpose. But when he sells his property with the intent of applying only a part of the proceeds to the payment of certain debts and to use the balance for the purpose of extorting an unjust compromise from other creditors, the sale is in contravention of the statute of frauds. Evidence considered and held not to warrant a finding that a sale of property by an insolvent debtor was not made with intent on his part to hinder and delay his creditors. *Rogers v. Driscoll*, 415.
2. Evidence considered and held sufficient to support a finding that a fraudulent intent on the part of an insolvent debtor in the sale of his property was not known to or participated in by the purchaser, and the sale was therefore valid as against existing creditors. *Id.*
3. The issue being whether or not a sale of land by an insolvent debtor was fraudulent, the court submitted the following issue to the jury: "At the time of the transfer did D (the purchaser) have knowledge of facts and circumstances sufficient to cause an honest man of ordinary prudence to make enquiry, etc.?" Held, the use of the word "honest" in that connection was not error. *Id.*
4. Where the employee was discharged from a position of trust and confidence because of the discovery by the employer of facts affecting his character for honesty, though not, so far, affecting the master's business, a charge

Fraud—*Continued.*

that a retention in his employment and failure of the employer to discharge on learning the facts, would condone the matter and deprive the employer of the right to discharge on such ground, was erroneous. The question of condonation or continued right to discharge was one of fact to be determined by the jury. Dishonesty, like incompetency, is a continuing condition, and the right to discharge therefor not lost by retention in employment under circumstances not amounting to equitable estoppel. *Kelly Plow Co. v. London*, 209.

Fraudulent Conveyance.

1. A conveyance of property which is in fact exempt as homestead is not a conveyance in fraud of creditors, although the conveyance was made under the mistaken belief that creditors might seize it. Property so conveyed might be recovered by the grantor. *Du Perier v. Du Perier*, 225.
2. The fact that a grantor who by deed exchanged his real property in Texas for other real estate in California had no other property in Texas at the time, does not, it seems, establish his insolvency or that his conveyance was made to defraud creditors. *Folkes v. Wyatt*, 515.
3. The intent of a grantor to defraud creditors by his conveyance does not affect the title of the grantee who paid a valuable consideration without knowledge of such intent. *Id.*

Future Earnings.

Diminished earning capacity. See *Pleading*, 9.

Gaming Transaction.

1. That some of the officers of an incorporated oil mill company, who were also officers and directors in an incorporated bank, knew of or conducted transactions in futures for and in behalf of the mill, would not make the bank a participant in said transactions or responsible for its officers when acting alone for the oil mill company, it not appearing that the respective boards of directors of the bank and the mill knew of, sanctioned or took any action whatever concerning said transactions. This rule applied in a suit by a bank upon promissory notes executed by a stockholder in an oil mill company, the defense being that the notes were given to carry on dealings in futures and were therefore invalid. *Dowell, Admr., v. Collin County Natl. Bank*, 244.

Garnishment.

1. A garnishment bond recited that whereas in a certain suit then pending the plaintiff "caused" a writ of garnishment to issue, etc. Held, that the use of the word "caused" did not necessarily or even fairly show that the issuance of the writ of garnishment had preceded the execution and filing of the bond, and it was error to sustain a motion to quash the bond and writ of garnishment on that ground. *Geiser Mfg. Co. v. Watkins*, 616.

Guardian and Ward.

1. A bill of review may be brought in the probate court under art. 2799, Rev. Stats., to revise an order discharging a guardian resigning and turning over the property of minor wards to his successor, and to obtain a restating of his guardianship accounts, at any time before the barring of such action of the wards by limitation after their attaining their majority. *Nicholson v. Nicholson*, 357.
2. Pleading held sufficient in a bill of review attacking the accounts of a guardian for errors of law apparent on his accounts and allegations charging him with fraudulent conduct. *Id.*
3. The power to correct the order of the probate court by bill of review does not embrace authority to tax the guardian for property of the wards not inventoried or accounted for by him. Francis v. Northcote, 6 Texas, 186. *Id.*
4. The guardian is not entitled to credit for expenditures for the maintenance and support of the wards in excess of the income derived from their

Guardian and Ward—*Continued.*

estate in the absence of an order of the court authorizing the use of the corpus of the estate for that purpose. *Id.*

5. Where credits claimed by the guardian for moneys expended are disallowed as not having been paid, the commissions on such payments are also to be deducted from his credits. *Id.*
6. A charge against the guardian of the difference between the inventoried value of personal property and the amount realized on its sale, on the ground that the sale was without order of the court, is in the nature of a liability as for devastavit, and not permissible on bill of review. But debits and credits ascertained from review of the orders made by the court are proper. *Id.*
7. The only judgment which the probate court could make on a bill of review of the order discharging a guardian of minors and settling his accounts was a restatement of the account and amount found due. It was proper to include in this the accounts of all the wards, though one was not a party to the bill, and was barred by limitation of his action for his part. *Id.*

Harmless Error.

In exclusion of evidence. See *Evidence*, 24.
In refusal to dissolve injunction. See *Injunction*, 6.
In refusal of jury trial. See *Juries*, 1.

1. No matter how objectionable the testimony of a certain witness might be, it can not be cause for reversal when the testimony of other witnesses to the same effect is admitted without objection, and especially so when the appellant himself testifies to the same effect. *Austin v. Jackson Trust & Sav. Bank*, 155.
2. On appeal from a judgment on a purchase money note with foreclosure of the vendor's lien, appellant, the payee of the note which he had assigned to plaintiff, who resisted the foreclosure on the ground that his sale and the note were a device to raise money on land which was his homestead, the finding of this defense being against him, could not complain of the overruling of his plea in abatement on the ground that the suit was brought one day before the maturity of the note, the maker interposing no such defense and not joining in the appeal. Nor could such appellant complain of supposed errors relating to the validity or amount of plaintiff's lien or that of an intervener also obtaining a foreclosure. *Guderian v. Clark*, 248.

Hearsay.

Declarations of vendor. See *Evidence*, 12.
Statements constituting res gestae. See *Evidence*, 13.

Heirs.

Partition of estate by. See *Administration*, 1.

Highways.

Assessment for street improvement. See *Cities*, 1, 2, 3.
Injunction against opening. See *Costs*, 1.
Dedication of streets. See *Dedication*, 1, 2.
Condemnation for street purposes. See *Eminent Domain*, 1.
Canals and streams. See *Navigable Waters*, 1-4.
Recognition and use. See *Public Road*, 1, 2, 3.

Homestead.

Conveyance in fraud of creditors. See *Fraudulent Conveyance*, 1.
Discharge of lien on. See *Vendor and Purchaser*, 9.

1. A homestead is not subject to a judgment lien. *Garth v. Stuart*, 391.
2. Where the surviving husband, there being no children, is no longer the head of a family, although entitled to occupy the homestead, it is protected from forced sale, even subject to his homestead rights; and this protection extends to and forbids sale under foreclosure of the lien of an

Homestead—*Continued.*

attachment against him as well as sale under execution. *Strong v. Elder & Sons*, 88.

3. The levy of an attachment writ is a step in the course of securing a forced sale, and does not create a lien which might be enforced against the homestead. *Id.*
4. The fact that the claimant of homestead rights, a husband without children after the death of the wife, has the right to sell or mortgage it, and that such mortgage lien may be enforced subject to his homestead rights, presents a different case from that of sale under execution or attachment lien. Harle v. Richards, 78 Texas, 80, distinguished. *Id.*
5. If the husband conveys the homestead by a deed in which the wife does not join, such deed conveys the title to the property as against all other persons except the wife and those claiming under her. Such deed is void only in so far as the homestead right of the wife is concerned, and subsequent acquisition by her of another homestead would not estop her from asserting any right in the one sold by the husband. *Pullman v. City of Houston*, 48.
6. The fact that a husband and wife continued in possession of the homestead after the execution of an absolute deed thereto, would not be notice to a purchaser from the grantee in the deed of any claim of title to the property on the part of the husband and wife inconsistent with their deed; and so of a creditor of the grantee who takes a deed of trust on the property to secure a loan. *Girardeau v. Perkins*, 552.
7. A deed of trust by a husband and wife upon the homestead to obtain money with which to discharge a lien and pay past due taxes on the same, is valid. *Id.*
8. Money loaned to a husband and wife for the avowed purpose of improving the homestead can not be secured by deed of trust on the same although the money was in fact used for said purpose, unless there be at the time a contract duly executed by the wife for furnishing the materials or doing the work necessary for the improvements. *Id.*
9. Where a note secured by a deed of trust upon a homestead is made up of several items, some of which might legally be secured by such lien and others could not be, payments made on the note by the debtor without direction to which item or items they should be applied, will be applied first to extinguishing the items which constitute a valid lien. *Id.*
10. A purchaser of real property at a trustee's sale will be charged with notice that the property was occupied by the grantors in the deed of trust as their homestead at the time the deed of trust was executed, and this, though the grantors were dead and the property was not occupied as a homestead at the time of the trustee's sale. *Id.*
11. The very particularity with which debts, to secure which a deed of trust is given, are described as being such as might be secured by lien on a homestead might be sufficient to charge a purchaser at the trustee's sale with notice that the property was a homestead and to require investigation into the nature of the debts. *Id.*
12. The sale of a homestead under a deed of trust to pay a debt therein named will confer no title on the purchaser when a considerable part of the debt to secure which the lien was given could not be made and was not a valid lien on the homestead. *Id.*
13. The fact that the husband contracted for, made a partial payment upon, and received a deed to a tract of land, and that he and his wife thereafter moved from the old homestead to the land so acquired with the intention of making the same their homestead, constituted an abandonment of the old homestead, and a sale of the same thereafter at the instance of the husband by a trustee to whom it had been conveyed as security for debt while occupied as their homestead, would pass title to the same as effectually as if conveyed by the husband and wife themselves, and the fact that the new homestead was lost because of inability to pay for the same, would not affect the question. *Alvord Natl. Bank v. Ferguson*, 113.
14. In the absence of such fraud upon the wife as would entitle her to a rescis-

Homestead—*Continued.*

sion, a sale of the homestead by the husband alone would become effective to convey title when thereafter abandoned as a homestead. *Id.*

15. The husband has the right to control the proceeds of the sale of a former homestead, and in the absence of such a fraud practiced upon the wife as would entitle her to a rescission of the conveyance of the former home, the husband has the right to apply the proceeds of the sale of the same to the payment of community debts, even against the wishes of the wife. *Id.*

Husband and Wife.

Jurisdiction over property rights. See *Divorce, 1.*
Surviving husband. See *Homestead, 2.*
Conveyance by husband. See *Homestead, 5-8.*
Abandonment of homestead by husband. See *Homestead, 13, 14.*
Disposition of proceeds of homestead. See *Homestead, 15.*
Assault upon wife. See *Offset, 2.*

1. A husband is so far the agent of the wife when engaged in the management of her property that statements and admissions made by him may be received in evidence as admissions against her interest. *Knights of Mod. Maccabees v. Gillis,* 110.
2. The wife can not maintain an action to require the husband to support her except by way of alimony in a suit for divorce, or by action in the County Court under art. 2979, Rev. Stats., for an allowance for support out of her separate property. But she may maintain injunction against control or management of her separate property by a husband who has abandoned her and repudiated his duties. *Burns v. Burns,* 549.
3. Where a suit by the wife sought divorce from the husband and injunction against his management of her separate lands on the ground of abandonment and nonsupport, the jurisdiction of the court, divorce being refused, was limited to the relief which could be granted under the prayer for injunction. It had no power to award to appellee the possession and control of her separate lands subject to an annual payment to the husband as rent for his community interest therein by virtue of improvements made on such lands. *Id.*
4. A deed by a husband to a wife of community property vests the title thereto in her separate estate, and this, although there be no recitals in the conveyance evidencing such intention on the part of the husband. *Du Perier v. Du Perier,* 224.
5. When a third party conveys to the wife by a deed which does not in terms convey to her separate use, nor show that the consideration was paid out of her separate estate, the title so conveyed vests prima facie in the community. Such prima facie effect may be avoided by proof that the consideration was paid out of the wife's separate estate, or that it was the intention of the grantor that the property should belong to the separate estate of the wife. *Id.*
6. A husband and wife conveyed a town lot, the husband's separate property, to a third party with the understanding that said party would convey said property to the wife so as apparently to vest the title in her separate estate; this was done to prevent the husband's creditors from levying on the property, and not for the purpose of making the property the wife's separate property in fact; the deed from the third party to the wife by mistake failed to use such apt words as would make the property the wife's separate property. The husband and wife separated, and the wife sued to divest the title to the lot out of the husband and out of the community estate and vest the same in her separate estate. Held, the intentions of the parties should control; and because it was never the intention of the husband or the wife that by said transaction the property was to become in fact her separate property, she was not entitled to recover. *Id.*

Illegal Contract.

In sale of school land. See *County School Land, 1.*
Transactions in futures. See *Gaming Transaction, 1.*

Impeachment of Witness.

Charge limiting effect of evidence. See *Instructions to Juries, 5, 6, 7.*

1. In order to impeach a witness by proof of previous statements contradicting his testimony, they must be called to his attention, so as to afford him opportunity for explanation, and other proof of such previous statements is not receivable where he admits having made them. *Texarkana Gas & Elec. Co. v. Lanier,* 198.
2. Where a witness was questioned in detail on cross-examination as to all the statements made in his former testimony, and admitted them all, with explanations that in some he was mistaken, the written testimony is not then admissible. His previous statements can be proved for impeachment only when he denied making them, or when, he admitting generally that the testimony was given, the writing was necessary to show what he so admitted having sworn. *Id.*

Improvements.

Assessments of benefits from street paving. See *Cities, 1, 2, 3.*
Money borrowed for improvement of homestead. See *Homestead, 8.*
Verbal sale of land. See *Statute of Frauds, 1.*
By joint owner. See *Trespass to Try Title, 4.*

Indorsement.

Of check for collection. See *Banks and Banking, 1.*

Infancy.

Plea of. See *Judgment, 8.*

1. Contracts made by minors are not void because of nonage but voidable merely; and such contracts as are made for the reasonable value of necessaries and in pursuance of statutory authority are binding. Some voidable contracts of a minor bind him unless he disaffirms them, while others do not bind him unless he ratifies them. Such voidable contracts as are wholly or partially executed need no ratification but are binding until disaffirmed. This principle applies when an interest in property of a fixed and permanent nature is vested in the minor or other party under an executed contract, as by a conveyance of real estate. In such case there must be a distinct act of disaffirmance on the part of the minor, and that within a reasonable time after attaining majority; what is a reasonable time is a question of fact. *Clemmer v. Price,* 84.
2. A minor purchased a tract of land paying part cash and executing his promissory notes for the balance, the notes being secured by express lien; the notes matured about six months after the minor came of age and suit was soon thereafter filed upon them; the minor answered setting up his minority at the time the contract of purchase was made, and prayed that the contract be cancelled and that he have judgment in reconvention for the cash payment. Held, that the minor did not disaffirm the contract in a reasonable time and was liable on the notes. *Id.*

Injunction.

Filing of transcript. See *Appeal, 5.*
Appeal from order granting. See *Assignment of Error, 1.*
Against opening road. See *Costs, 1.*
Against interference with wife's separate property. See *Husband and Wife, 2, 3.*
Against double assessment. See *Taxation, 6.*

1. Courts of equity have the power to grant without notice a mandatory injunction, even to the extent in a proper case of restoring to the owner the possession of premises of which he has been deprived by force. *Holbein v. De La Garza,* 125.
2. The Act of the Thirty-First Legislature amending article 2989, Rev. Stats. (Gen. Laws, 1909, p. 304), eliminates any objection to a petition for injunction on the ground that the plaintiff has an adequate remedy at law. *Id.*
3. The unlawful cutting of trees growing upon land is waste and irreparable

Injunction—*Continued.*

injury, and to prevent waste is a recognized use of the writ of injunction. Therefore a petition for injunction which, besides alleging irreparable injury generally, alleges a threatened waste by the unlawful cutting of timber growing upon land, states facts showing such threatened irreparable injury as would authorize the interposition of a court of equity to prevent the same by injunction. *Id.*

4. A petition for a mandatory injunction to restore to complainant the possession of land from which it was alleged that he had been ousted by force, considered, and held insufficient to warrant the issuance of such writ, either with or without notice to the defendant. It is only in extreme cases, such as seldom occur, that such a remedy can be justified before a hearing on the merits. *Id.*
5. It is seldom, under our equity procedure, that it is necessary to issue even a prohibitory writ of injunction without an opportunity given the defendant for a hearing. A temporary restraining order may in all cases be issued compelling immediate cessation of the threatened injury until such time as the defendant can be heard. *Id.*
6. There can be no merit in an assignment of error that the trial court erred in refusing to sustain a motion to dissolve an injunction, when on final hearing the injunction is properly perpetuated. *Rogers v. Driscoll*, 416.
7. The rule that equity will not interpose when the party applying for an injunction has an adequate remedy at law, is not one which absolutely denies jurisdiction to a court of equity. It is rather a rule of convenience and propriety which the defendant or the court may avail itself of and which the defendant may waive. Therefore when this objection to an injunction is presented for the first time in an amended answer on the eve of trial, it was not error for the court to overrule the same. *Id.*
8. On an appeal from an order dissolving a temporary writ of injunction the transcript must be filed in the Court of Civil Appeals within fifteen days after the date of the order. This matter is jurisdictional, and the appellate court has no authority to extend the time even by agreement of parties. *C. B. Livestock Co. v. Parrish*, 386.

Injuries to Person.

Recoveries held not excessive. See *Damages, 15-19.*
Double recovery for. See *Damages, 15.*
Causal connection. See *Instructions to Juries, 25.*
Diminished earning capacity. See *Pleading, 9.*

Innocent Purchaser.

Knowledge of fraudulent intent. See *Fraud, 2, 3; Instruction to Juries, 26.*
Unrecorded deed. See *Notice, 2, 3, 4.*
Sale after payment of debt. See *Powers, 7.*

1. Where a creditor attached and bought in land which his debtor had conveyed by deed prior to but recorded after the attachment levy, he acquired no title if he had knowledge of such conveyance before acquiring his attachment lien. Any one purchasing from him after the debtor's prior conveyance was recorded had the burden of proving that his grantor's attachment lien was acquired without notice of the conveyance in order to sustain his title against it. *Folkes v. Wyatt*, 515.
2. On the question whether an attaching creditor had notice or was put on inquiry as to the existence of a deed from the debtor unrecorded when the writ was levied it was proper to show that about a month before the deed was made such creditor was informed of the details of a pending trade to be closed by such conveyance from the debtor on his title being approved. *Id.*

Insolvency.

Preference of creditors. See *Fraud, 1, 2, 3.*
Property in State. See *Fraudulent Conveyance, 2.*
Dismissal as to insolvent parties. See *Judgment, 3.*

Instructions to Juries.

Provocation of assault. See *Assault, 1.*
Proof of conversion. See *Conversion, 1.*
On measure of damages. See *Damages, 3, 4, 6.*
Assuming absence of market value. See *Damages, 9.*
Proof sustaining one issue only. See *Damages, 11.*
Loss of market by delay. See *Damages, 13.*
Death of minor son. See *Damages, 14.*
Personal injuries. See *Damages, 15.*
Condoning fault of employee. See *Fraud, 4.*
Voluntary exposure to danger. See *Insurance, Accident, 2-4.*
On death in personal difficulty. See *Insurance, Life, 2.*
On authority of foreman. See *Master and Servant, 11.*
On scope of servant's duties. See *Master and Servant, 14.*
On failure to warn of danger. See *Master and Servant, 20.*
Assuming existence of knowledge. See *Master and Servant, 27.*
Justifying refusal of special charge. See *Negligence, 1, 21.*
Justifying instruction for defendant. See *Negligence, 3, 6.*
Submitting issue of contributory negligence. See *Negligence, 7.*
Person insensible on railway track. See *Negligence, 10, 11, 12.*
Held not on weight of evidence. See *Negligence, 15.*
Peremptory charge improper. See *Negligence, 22.*
Failure to submit issue pleaded. See *Pleading, 10.*
Motion to instruct verdict. See *Practice in Trial Court, 2.*
Ground for reversal if erroneous. See *Practice on Appeal, 1-5.*
Action for agreed price. See *Quantum Meruit, 1.*
Where evidence is conflicting. See *Question of Fact, 1, 2.*
On obligation to fence track. See *Railways, 5.*
On duty as to equipment of engine. See *Railways, 11.*
On causal connection. See *Telegraph, 1.*
On notice of claim for damages. See *Negligence, 3.*
On delivery beyond free limits. See *Telegraph, 4.*
On variance between proof and pleading. See *Variance, 1.*

1. A charge should be considered and construed as a whole. Any charge can be distorted if only garbled portions of it are taken up for criticism. *Atchison, T. & S. F. Ry. Co. v. Seeger*, 526.
2. In a suit for damages resulting from negligence, the charge should confine the jury to the negligence alleged, and not submit the issue of negligence generally. *Gulf, C. & S. F. Ry. Co. v. Bennett*, 321.
3. A charge that the act of one employed in a position of trust in defrauding a third party could not justify his discharge by his employer was upon the weight of evidence and improper. *Kelly Plow Co. v. London*, 209.
4. A charge of negligence after discovery of another's peril criticised as assuming the fact that the person charged with negligence realized the other's peril. *Texarkana Gas & Elec. Co. v. Lanier*, 198.
5. Where no charge limiting certain evidence to purposes of impeachment was necessary, an instruction that it could be considered for that purpose was on the weight of evidence, and was erroneous. *Id.*
6. Where evidence of a previous statement by a witness was admitted against him because he was a party, a charge that the jury could consider the same as affecting his credibility was erroneous as to him, being an invasion of the province of the jury. *Id.*
7. Where the testimony given by a defendant on a coroner's inquest was more favorable to defendants than that given on the trial, its admission could not be considered prejudicial to his codefendant unless limited by a charge restricting its effect against the latter to purposes of impeachment, and no such charge was called for in his interest. *Id.*
8. Trial courts have no right to refer in their charges to the testimony of any particular witness or to testimony to any fact or group of facts unless this becomes essential to the protection of some right of one or more of the parties. *Id.*
9. Where a judgment is supported by only a slender margin of evidence slight deviation from the rule prohibiting charges on the weight of evidence may be cause for reversal. *Id.*

Instructions to Juries—*Continued.*

10. A special charge which ignores the real issue made by the pleading and evidence and upon which the case was tried, is properly refused. *El Paso & S. W. Ry. Co. v. Welter*, 23.
11. In a suit for the value of animals struck and killed by a railroad train, charge considered and held not subject to the objection that it gave undue emphasis to plaintiff's allegations of negligence. *Texas Central R. Co. v. Hico Oil Mill*, 331.
12. It is error for the trial court to submit as an issue a fact about which there is no conflict in the evidence. *Id.*
13. The issue being whether or not a railroad company was relieved from the duty of fencing its track at a place where plaintiff's animals were killed, the court charged the jury as follows: "The burden of proof is upon the defendant to show that it was necessary to keep the track unfenced at said place; and unless you find from the evidence that it was necessary to keep said track at said place unfenced, you will find for the plaintiff." Held, defective in that it gave the jury no guide by which to determine what conditions would render it necessary to keep the track unfenced. *Id.*
14. Appellant can not complain of a charge which merely directs a verdict in his favor on the finding of certain facts. *Sullivan-Sanford Lumb. Co. v. Cooper*, 537.
15. Requested instructions were properly refused where the matters were covered by the charge given or where those asked were inapplicable to the issues made by the evidence. *Id.*
16. A failure by the court to submit an issue raised by the evidence is not reversible error in the absence of a request to submit the same. *Rogers v. Driscoll*, 416.
17. Requested charges are properly refused when they instruct a verdict upon the determination of only one of several issues raised by the pleading and evidence; and so when the phase of the case presented thereby is sufficiently presented in the main charge of the court. *Ft. Worth Belt Ry. Co. v. Johnson*, 105.
18. While the litigant has the right to have presented in an affirmative form any group of facts constituting a defense or cause of action, this right should not be so extended as to require the trial court to emphasize by a special charge each separate fact constituting the group. *Id.*
19. When a matter of defense is properly pleaded and supported by proof, it is error for the trial court to refuse a special charge distinctly submitting the issue to the jury, the issue not being submitted in the main charge. *Receivers Kirby Lumb. Co. v. Lloyd*, 490.
20. The proof raising a question as to how far the loss of plaintiff's cotton crop was due to overflow or to injuries by the boll weevil, defendant was entitled to a requested instruction that it was not liable for injury by the latter cause. *International & G. N. R. Co. v. Fickey*, 133.
21. It is proper to refuse requested instructions on matters sufficiently covered by the charge given. *Texarkana & F. S. Ry. Co. v. Brandon*, 452.
22. It is not error to refuse a special charge when the issue presented thereby is covered by the main charge, even though the special charge be couched in better, simpler or more accurate language, provided the inaccuracy of expression in the main charge is not sufficient to mislead the jury. *Dunham v. Orange Lumb. Co.*, 268.
23. When it can not be certainly determined that the verdict of a jury was not influenced by an erroneous charge, the verdict should be set aside. *Id.*
24. Requested instruction on effect of knowledge by injured employee of the negligent character of the coservant by whose fault he was injured held properly refused because embraced in the charge given. *Freeman, Receiver, v. Shaw*, 295.
25. The issue being whether or not the disabilities of which plaintiff complained, in a suit for damages for personal injuries, were caused by a derailment of defendant's railroad train or from other causes, a charge which required the jury to find from the evidence that plaintiff's disabilities were directly caused by said derailment before they could return a verdict for the plaintiff, was a sufficient presentation of the defense plead by defendant, and the issue joined, in the absence of a re-

Instructions to Juries—*Continued.*

quested instruction to return a verdict for defendant if the plaintiff was not injured by the derailment. *Freeman, Receiver, v. Nickels*, 154.

26. Plaintiff sought damages for fraud committed by one defendant and recovery of property obtained thereby from purchasers alleged to have had notice of the fraud. A charge requiring a verdict for all the defendants if the purchasers had no notice of the fraud was error demanding reversal of the judgment in favor of the defendant from whom damages were sought for its perpetration. *Mounce v. Crowson*, 534.
27. A mere instruction to the jury that certain issues were to be determined by a preponderance of the evidence is not equivalent to an instruction as to the burden of proof, and in the absence of such an instruction when the evidence is conflicting upon a material issue a litigant has the right to request and it is the duty of the court to give a charge placing upon the proper party the burden of proof. *Woodmen of World v. McCoslin*, 574.
28. In a suit for damages for personal injuries resulting in the death of plaintiff's minor son, wherein defendant plead contributory negligence on the part of the son, charge considered and held not subject to the criticism that it placed on the plaintiff the burden of sustaining defendant's plea of contributory negligence. *Dye v. Chicago, R. I. & G. Ry. Co.*, 614.
29. Charge considered and held subject to the objection that by repetition of the subject of burden of proof it gave undue emphasis to that issue to appellant's prejudice. *Id.*
30. Plaintiff's right to recover for injury to his land and by seeds of Johnson grass maturing on the right of way of defendant railway being established by verdict, the fact that the charge submitting the defense that plaintiff himself permitted such seed to mature on his land referred only to the portion so injured by defendant's acts was not cause for reversal; the evidence disproving such default of plaintiff was the same and required the same verdict as to all parts of the land; and the error, if any, was one of mere omission, unavailable in the absence of a requested instruction. *Missouri, K. & T. Ry. Co. v. Malone*, 254.
31. In a suit for damages for personal injuries the court charged the jury in part as follows: "If you believe from the evidence that . . . the plaintiff was a passenger on one of defendant's street cars . . .; and that the said car upon which plaintiff was a passenger, if you believe she was a passenger, was derailed as alleged in plaintiff's petition; and if you further believe from the evidence that such derailment, if any, was directly caused by negligence of defendant, if any, as alleged in plaintiff's petition; and if you further believe from the evidence that by reason of such derailment, if any, the plaintiff received any injuries alleged in her petition, then I charge you your verdict must be for the plaintiff." Held, while the charge did not submit the question of negligence or not as clearly as might have been done, it was not subject to the objection that it assumed that defendant was guilty of negligence. *San Antonio Trac. Co. v. Probandt*, 265.

Insurance, Accident.

1. A ticket or policy of accident insurance contained the following stipulations: "This ticket does not insure any person under eighteen or over sixty-five years old, nor any person employed on any public conveyance," etc. Held, the legal representatives of a person over sixty-five years old at the time he bought the ticket of insurance and at the time he was fatally injured, could not recover on said contract. By the terms of the contract a person over sixty-five years of age was not insured thereby. *Perry v. Standard L. & I. Ins. Co.*, 50.
2. An accident insurance policy contained a stipulation that where the accidental injury resulted from "voluntary exposure to unnecessary danger or obvious risk of injury," the amount payable should be one-fourth of the amount which otherwise would be payable; in an action upon the policy the evidence showed that the assured was an experienced railroad employee in active service on and about railway trains; that on the oc-

Insurance, Accident—*Continued.*

casion of his death he was a passenger on a railway train which was nearing a station and was moving at about six miles an hour when he opened the trap door of a vestibuled coach, and as he started down the steps of the coach his feet seemed to slip and he fell off the train and was killed. Held, a peremptory instruction for the defendant was properly refused because (1) the evidence did not show that the deceased was killed while in the act of alighting from a moving train; and (2) if it did, it would not follow as matter of law that the deceased voluntarily exposed himself to danger. Whether or not there was obvious risk of injury to the deceased under all the circumstances, was a question of fact for the jury. *Continental Casualty Co. v. Deeg*, 35.

3. By the expression "voluntary exposure to unnecessary danger or obvious risk of injury" as used in a policy of accident insurance, is meant that the danger must be one so logically attending the act that the assured must be conscious of it. *Id.*
4. The expression "unnecessary exposure to danger" has not the same meaning as "voluntary exposure to unnecessary danger." *Id.*

Insurance, Fire.

Taxation of foreign company. See *Constitutional Law, 1, 2.*

1. Chapter 5, article 3096aa, added to Title 58, Revised Civil Statutes, by the Act of March 27, 1903, Laws Twenty-Eighth Legislature, 94, enacting that insurance contracts shall not be avoided for misrepresentations by insured not material to the risk, applies to policies of fire insurance as well as to life insurance. *Scottish U. & N. Ins. Co. v. Wade*, 631.
2. The Act of May, 1897, Laws Twenty-Fifth Legislature, 197, relating to license of fire and marine insurance companies, while modifying certain provisions of the law governing them contained in Title 58, did not refer to such title or its chapters or articles, and can not be taken as adding chapter 5 to the same. The Act of March 27, 1903, adding chapter 5 embracing articles numbered 3096aa to 3096eee, created no confusion or uncertainty with regard to the numbering of chapters and articles. *Id.*
3. A contract of insurance upon a stock of goods avoiding the policy unless the insured shall have made within twelve months previous or shall make within thirty days after its issuance a complete itemized inventory of the stock on hand, to be preserved and furnished the insurer in case of loss, is not complied with by the making of an inventory from which the insured intentionally omitted goods to the value of from $2,000 to $4,000, amounting to one-tenth to one-fifth of the stock. A reasonable compliance with the contract is required and slight or inadvertent omissions are not material, but this is not a reasonable compliance, and authorizes a peremptory instruction in favor of the insurer. *Orient Ins. Co. v. Dorroh-Kelly Merch. Co.*, 289.
4. If the insured had furnished the insurer anything from which the information contracted for in the form of an inventory could be reasonably ascertained, a question as to substantial compliance with the contract might be presented, but it did not arise in the absence of such information or of an inventory such as the contract called for. *Id.*
5. The insurer must recover, if at all, upon the terms of the contract, and can not, without substantial compliance therewith, recover on the basis of the stock being of the value shown by an incomplete inventory where he agreed to furnish a complete one. *Id.*

Insurance, Life.

1. The issue being whether certain dues were paid within the time stipulated in the contract of insurance in a benevolent order, it was error to exclude the notice and proofs of death furnished by the beneficiary to which was attached the affidavit of the finance keeper of the lodge, to which the insured belonged, reciting the date when said dues or assessments were paid, the objection to said evidence being that it was hearsay as to the beneficiaries. Said papers were admissible as representations by the beneficiaries. *Knights of Mod. Maccabees v. Gillis*, 109.
2. In a suit upon a contract of life insurance, the defense being that the

Insurance, Life—*Continued.*

insured violated the contract of insurance by making an unlawful assault with a pistol upon a third party whereby a duel resulted and the insured was killed, charge considered and held, when considered and construed as a whole, not subject to the objections that it ignored said defense; nor that it assumed, without warrant in the evidence, that the third party was the aggressor; nor that it submitted an issue (that of apparent as distinguished from actual danger) not raised by the evidence. *Woodmen of World v. McCoslin*, 574.

3. The insured in a policy of life insurance has the right to act in self-defense under a reasonable apprehension of danger from an assault by a third party, and by so doing he will not forfeit his rights under such policy containing a stipulation that the policy would be void in the event the insured should die in consequence of a duel or of the violation or attempted violation of the laws of the State. *Id.*

Intent.

To defeat plea of privilege. See *Venue, 3.*

Interest.

On award in condemnation proceedings. See *Eminent Domain, 1.*
Unlawfully collected. See *Usury, 1, 2.*

1. The words "without interest" in a note or other contract mean only that no interest shall be charged until after maturity; thereafter the legal rate will be charged. *Ball v. Belden, Admr.*, 29.

Intervention.

In receivership proceedings. See *Receivers, 2-9.*

1. In an action for a debt a third party has no right to intervene because he was a mortgagee or owner of property attached by plaintiff as defendant's. He had a remedy by claimant's bond. To entitle him to intervene he must have an interest in the subject matter of the litigation between plaintiff and defendant; this, such intervenor did not have. Fleming v. Seeligson, 57 Texas, 531, and Johnson v. Luling Mfg. Co., 24 S. W., 996, distinguished. *Dorroh v. Bailey*, 282.
2. In a mandamus proceeding to compel the clerk of a court to issue an execution on a judgment, the judgment debtor may properly be permitted to intervene and contest the motion. *Kruegel v. Murphy & Bolanz*, 482.

Intoxicating Liquors.

Local option law. See *Constitutional Law, 4.*

1. Under the statutes as they now stand, the interval of two years which must elapse between local option elections in the same territory, must be computed from the date of the last order declaring the result. So, when a local option election is contested in the District Court and an appeal taken from the judgment of that court to the Court of Civil Appeals, the interval must be computed from the date of the order of the Commissioners' Court declaring the true result in accordance with the final judgment of the Court of Civil Appeals. *Coats v. Blanding*, 334.

Inventory.

Of property of ward. See *Guardian and Ward, 3, 4.*
Of insured property. See *Insurance, Fire, 3, 4, 5.*

Irrigation.

Rendering water unfit for. See *Proximate Cause, 1.*

Johnson Grass.

Charge on contributory negligence. See *Instructions to Juries, 30.*

Joint Contract.

Each liable for whole. See *Contract, 3.*

Joint Tenant.

Conveyance of specific part. See *Partition, 1.*

Joint Wrongdoers.

Fire set by trespassers. See *Trespass, 1, 2.*

Judge.

Agreement of parties on. See *Special Judge, 1.*

Judgment.

Amount below jurisdiction of court. See *Amount in Controversy, 5.*
In bankruptcy, effect of. See *Bankruptcy, 1, 2.*
Vouching in warrantor. See *Citation, 1, 2.*
On bill of review. See *Guardian and Ward, 7.*
Gives no lien on homestead. See *Homestead, 1.*
Where divorce is refused. See *Husband and Wife, 3.*
Declaring result of election. See *Intoxicating Liquors, 1.*
Findings required to support. See *Special Issues, 3.*
Description of land recovered. See *Trespass to Try Title, 3.*
Improvements made by defendant. See *Trespass to Try Title, 4.*

1. A vacated, set aside or reversed judgment, order or declaration is thereby deprived of its conclusive character as such, and can not be made the basis of any rights thereafter. *Coats v. Blanding*, 334.
2. In a suit against a partnership the petition gave the names of the two persons composing the partnership; both of said persons filed an answer; the judgment was against the partnership, reciting that it was composed of the persons who were alleged to compose the partnership and who had answered. Held, the judgment was not subject to the objection that it was not final in that it did not dispose of all the parties before the court. *Williams Ld. Co. v. Crull*, 345.
3. An appeal by one defendant from a judgment against three makers of a promissory note removed the entire case for trial de novo. A judgment by default entered against appellant and his sureties on appeal bond, not disposing of the other defendants, was void, and it was proper practice, at a subsequent term, on motion, to dismiss as to such defendants not disposed of, on showing that they were insolvent, and enter judgment nunc pro tunc against appellant and his sureties. *Uher v. Cameron State Bank*, 134.
4. In an action on a dormant judgment in Justice Court, rendered against E. & Co., the record showing that defendant appeared in person and by attorney, but failing to show, the citation being lost, who composed the firm, was cited, or appeared, it was permissible to show by parol that the citation was against E. alone, doing business under the style of E. & Co., and that he was the person served, appearing, and against whom the judgment was rendered, and on such proof to render judgment against him upon the former recovery. *Easterwood v. Burnett*, 521.
5. If a judgment describes the particular tract of land in controversy so that it can be located and identified, it is all that is required. That the description does not mention the original survey of which it is a part, nor disclose how much of said survey is included in the judgment, is immaterial. *Pratt v. Slade*, 531.
6. A County Court would have the power to amend in August a judgment rendered in June before upon the award of commissioners in condemnation proceedings so as to embrace a certain tract of land which, by mistake of all the parties, was omitted from the judgment, and such amended judgment would be a bar to a suit by the original owner for the land omitted from the original judgment. *Getzendaner v. Trinity & B. V. Ry. Co.*, 486.
7. A mere judgment of nonsuit will not constitute a bar to a further proceeding by a plaintiff who has suffered it; but a judgment of a court upon the merits, having jurisdiction of the parties and of the subject matter, is conclusive in a collateral attack, however erroneous or irregular the judgment might be. *Keller v. Radford Gro. Co.*, 629.
8. To a suit upon an open account for goods bought, the defendant pleaded minority at the time the goods were bought; the plaintiff failed to appear at the trial, but the court heard the defendant's evidence in support of his plea and rendered judgment in his favor and against the

Judgment—*Continued.*

plaintiff. Held, that the judgment was a bar to any subsequent suit by the plaintiff or his assignee upon the account. *Id.*

9. The maker of a promissory note paid from time to time to the agent of the payee sundry amounts with instructions to credit the amounts on the note, which the agent promised but failed to do; after maturity of the note the payee brought suit for full amount of the note, interest and attorney's fee; the citation served on the defendant showed that the suit was for the face of the note and no credit was given for the payments which had been made; the defendant was in bad health, almost deaf, lived thirty miles from the court, and, being a railway station agent, could not leave his place of business to attend the court without risk of losing his position; he relied on the promise of the plaintiff, at the time the payments were made, to give him credit for the same, and made no defense to the suit; the plaintiff took judgment for the face of the note, interest, and attorney's fee; when execution was issued on the judgment, defendant paid the same and subsequently brought this suit to recover from the payee the sums of money received by him and which he failed to credit on the note and judgment. Held, the judgment in the first suit was not a bar to this suit, nor was the defendant guilty of such negligence in failing to make his defense in the first suit as would preclude him from maintaining this suit. *Long v. Moore*, 579.

10. It would seem that when there were three other final judgments involving the same questions and between the same parties, besides three other suits involving the same questions between the same parties pending on appeal, in all of which the appellant was cast in the actions, it could not be said that the appellant had not had his "day in court." *Kruegel v. Murphy & Bolanz*, 483.

Jurisdiction.

Burden of proving. See *Administration*, 2.
Dependent on amount. See *Amount in Controversy, 1-5; Appeal, 1-4.*
Where divorce is refused. See *Divorce, 1; Husband and Wife, 3.*
Failure to file transcript in time. See *Injunction, 8.*
To amend judgment. See *Judgment*, 6.

1. Presumptions in support of the jurisdiction can not be made in the face of a record which shows the facts to be otherwise. *Texas & P. Ry. Co. v. Hood*, 363.

Juries.

Reconciling contradictory testimony. See *Evidence, 1.*
Expert's opinion not binding on. See *Evidence, 16.*
Judges of weight of testimony. See *Question of Fact, 1, 2.*

1. When the evidence is such that the trial court should have instructed a verdict for the defendant had the case been tried with a jury, the refusal of the court to allow the plaintiff to have a jury can not be reversible error. *Kruegel v. Murphy & Bolanz*, 483.

2. Where the evidence is conflicting, a jury has the right to reject the testimony of one of the parties and accept exclusively the testimony of another. *Rogers v. Driscoll*, 416.

3. That a juror had as a grand juror previously investigated the evidence involved in a civil suit was not a legal disqualification; his silence when asked as to previous knowledge was not a ground for new trial in the absence of showing that he was biased or the party complaining was injured. Mounce v. Crowson, 533.

4. The Act of the Thirtieth Legislature (Gen. Laws, 1907, p. 269) known as the "Jury wheel law," prescribing a method for the selection of jurors in counties which have a city or cities therein with a population of 20,000 or more according to the United States census of 1900, is not in violation of article III, sec. 56, of the Constitution, which provides that the Legislature shall not, except as otherwise provided in the Constitution, pass any local or special law authorizing the summoning or empaneling of grand or petit juries. *Houston Elec. Co. v. Faroux*, 232.

5. The cases of Smith v. State, 54 Texas Crim. App., 298; Lee v. State, 54

Juries—*Continued.*

Texas Crim. App., 382, and Northern Texas Traction Co. v. Danforth, 53 Texas Civ. App., 419, followed in holding that the Act of 1907 (Gen. Laws, 1907, p. 269), concerning the selection of juries in certain counties, is not in violation of sec. 56, art. III, of the State Constitution forbidding the passage of local or special laws except in certain cases. *Rice & Lyon, Receivers, v. Lewis*, 274.

Justice Court.

Damages beyond jurisdiction. See *Amount in Controversy, 3, 4.*
Jurisdiction to be shown by record. See *Appeal, 1, 3, 4.*
Entries on docket. See *Pleading, 3; Practice on Appeal, 1, 6.*

Killing Stock.

Within switch limits. See *Railways, 5, 6, 7.*
At road crossing. See *Railways, 8.*

Knowledge.

Of fraudulent intent of grantor. See *Fraud, 2, 3; Fraudulent Conveyance, 2, 3.*
By juror of facts in case. See *Juries, 3.*
Of master's negligence. See *Master and Servant, 15.*
Of danger by servant. See *Master and Servant, 17, 18, 20, 21, 23, 36.*
Of danger by master. See *Master and Servant, 19, 20, 21.*
Of incompetency of servant. See *Master and Servant, 25, 27, 28.*
Of defects in machinery by servant. See *Master and Servant, 30, 32, 33, 36.*
Promise to repair defects. See *Master and Servant, 34, 35.*
Of necessity for inquiry as to evidence. See *New Trial, 1.*
Matters of common knowledge. See *Railways, 9.*
Of partner not imputed to partner. See *Telegraph, 9.*

Land Agent.

Express contract for commission. See *Contract, 2.*

Landlord and Tenant.

Possession by tenant. See *Notice, 3, 4.*

Leading Question.

Qualification of witness. See *Evidence, 25.*
Test for determining. See *Evidence, 26.*

Legacy.

Suit for property of estate. See *Administrator, 1.*

Legal Remedy.

Pleading absence of. See *Injunction, 2.*
Jurisdiction in equity. See *Injunction, 7.*

Legal Title.

Transfer of check. See *Banks and Banking, 1.*

Levy.

Creation of lien by. See *Homestead, 3.*

Lien.

Foreclosure of. See *Harmless Error, 2.*
By levy of attachment. See *Homestead, 2, 3, 4.*
Money borrowed to discharge. See *Homestead, 7.*
Unrecorded conveyance. See *Innocent Purchaser, 1, 2.*
Of vendors, laborers and material men. See *Receivers, 7.*
Election of remedies. See *Sales, 2.*
For taxes. See *Taxation, 1-6.*
Of vendor. See *Vendor and Purchaser, 9.*

Limitation.

Agreement to acquire title by. See *Contract, 6.*
Description of land as basis for. See *Deed, 3.*
Foreclosure and trustee's sale. See *Foreclosure, 1.*
Restating of guardian's accounts. See *Guardian and Ward, 1.*

1. The action being against the endorser of a promissory note, the filing of an amended petition for the purpose of correcting an error in the original petition in the initials of the name of the maker, will not constitute a new cause of action against which the statute of limitation might be pleaded. A change in the initials of the defendant's name did not change the original cause of action. *Austin v. Jackson Trust & Sav. Bank*, 155.
2. Where the evidence showed that injury to the tillable lands of riparian owners upon a stream would be the natural and permanent result of the construction of a canal, and that such result must have been anticipated as reasonably certain, the owners' cause of action for damage to their lands and crops arose upon the completion of the canal, and limitation would run from that time; and the mere fact that during seasons of unusual natural conditions no injury would result, would not alter the case. *Bigham Bros. v. Port Arthur C. & Dock Co.*, 367.
3. When the injury to land is the natural and necessary result of the construction of a canal, then the injury is permanent and continuous as distinguished from a recurrent injury of a transient character dependent upon accidents and contingencies, and the statute of limitation would run from the completion of the canal and not from the date of any special damage caused by the construction. *Id.*
4. Where an agent appointed to collect the rentals on certain property and pay over the same to a third party, accepts the appointment and agrees in writing to pay over the rentals in accordance with the terms of an assignment, in a suit by the assignee against the agent for rents collected but not paid over, the four years and not the two years statute of limitation would apply. *Dowlen v. George Mfg. Co.*, 124.
5. Where land had been formerly located and surveyed by virtue of a certain certificate, and afterwards, upon forfeiture of said location, the same land was located upon, surveyed and patented by virtue of a different certificate, the payment of taxes upon said land thereafter in or by the name of the first certificate will not be sufficient to support the five years statute of limitation under the second location and certificate. *Bond v. Garrison*, 620.
6. One claiming title to land by limitation testified that the owner told him and his wife "to go there (upon the land) and have what we made, and after such a length of time he would make us a deed to the place. It was to be under his control. That is how I came to take charge of the place." Held to evidence an intention on the part of the occupant to hold possession for the owner and not for himself, and there was no break in the possession between the date of the occupancy and the date of the deed subsequently made by the owner to the occupant. *Id.*
7. In proving title to land by limitation under a deed, a general description or designation of the tract by the name by which it is commonly known must yield to a specific description by metes and bounds; and the limitation title will be confined to the specific description although the grantor had title by limitation to adjacent land included within the general designation or name of the tract. *Id.*

Live Stock.

Duty to furnish feeding pens. See *Carriers of Goods, 3.*
Injury in transportation. See *Damages, 9-13.*
Delay in transportation. See *Evidence, 17, 18.*
Killed by railroad train. See *Instructions to Juries, 11, 12, 13; Railways, 5-8.*
Diseased and offensive. See *Nuisance, 1.*

Local Option.

Contest of election. See *Constitutional Law, 4; Intoxicating Liquors, 1.*

Lumber Company.

Operating tram road. See *Venue, 4.*

Mandamus.

To compel issuance of execution. See *Intervention, 2.*

Maps.

As evidence of public street. See *Dedication, 1, 2.*

Master in Chancery.

Findings by. See *Receivers, 5, 6.*

Master and Servant.

Term of employment. See *Contract, 7.*
Discharge of employee. See *Damages, 4.*
Probable course of action. See *Evidence, 21.*
Defrauding third party. See *Instructions to Juries, 3.*
Negligence in employing. See *Instructions to Juries, 24.*
Contributory negligence. See *Negligence, 6, 7, 8, 14, 15, 19, 20, 21.*
Alleging manner of injury. See *Pleading, 7, 8.*
Acting in scope of employment. See *Pleading, 8.*

1. An express company can only act through its servants and agents in the use of baggage trucks at a railroad station, and the act of a servant in leaving a truck too near a railroad train would not, in law, be the act of the express company itself. *Houston & T. C. R. Co. v. Wells-Fargo Co.*, 241.
2. When one acts through an agent he trusts the agent as to the manner of performance, and it must be assumed that he is satisfied the agent would act as he, the principal, would act under the circumstances. If this trust or confidence be misplaced, and if the agent mingles his personal resentment with the performance of his duties as agent, and commits an assault upon a party having business with him in his capacity as agent, the master is responsible. It would be otherwise if the assault was committed in resentment of offensive words or conduct at a time when the agent was not engaged in the conduct of his principal's business. *Wells-Fargo & Co. Express v. Sobel*, 62.
3. In a suit for damages for an assault and personal injuries inflicted by an employee of an express company, evidence considered and held to sustain a finding that the assault was committed while the employee was engaged in the performance and within the scope of his duties to the company, and that the company was responsible for the injuries. *Id.*
4. In a suit by a minor against a railroad company for damages for personal injuries caused by being forced by a brakeman to jump or fall from the ladder on the side of a freight car to which plaintiff was clinging, whereby plaintiff's feet were so crushed as to require amputation, charge of the court considered, and held not subject to the objections (1) that it failed to require the jury to find, as a condition of plaintiff's right to recover, that the brakeman whose conduct caused the plaintiff to jump from the train was acting in the line of his duty; (2) that it assumed that the brakeman, if he in fact ejected the plaintiff from the train, did so in the line of his duty to defendant; (3) that the evidence did not raise the issue of whether said brakeman was authorized to expel the plaintiff; and (4) that it ignored the issue of contributory negligence plead by defendant. *Texas & N. O. R. Co. v. Buch*, 304.
5. The nonenforcement by the master of a rule of conduct for his servants will justify a finding that the rule has been abrogated. *Id.*
6. In a suit for damages for personal injuries received while alighting from a street car about nine o'clock in the morning, testimony as to a statement of the conductor made in the afternoon of the same day as to how the accident occurred would not be admissible as part of the res gestae, nor as an admission that the witness was authorized to make, nor would it be admissible for the purpose of contradicting or impeaching the conductor in the absence of a predicate for that purpose. *Galveston Elec. Co. v. Dickey*, 472.

Master and Servant—*Continued.*

7. Even though a master may not be liable for injury inflicted upon a servant by the negligent act of a fellow servant, still when the negligence of the master is an active concurring cause with the negligence of the servant in producing the injury, the master will be liable. In so far as the opinion on the former appeal of this case, 44 Texas Civ. App., 534, trenches upon the foregoing proposition, the same is overruled. *Atchison, T. & S. F. Ry. Co. v. Seeger*, 525.
8. Where a railroad fireman, while under his locomotive engaged in the performance of his duty to clean out the ash-pan, was injured by the moving of the locomotive, and the moving was caused by the concurring negligence of the railroad company in furnishing a locomotive with a leaky throttle, and of the engineer in reversing the lever and releasing the brakes, the fireman was entitled to recover against the company even though the injury occurred in a jurisdiction where the master was not liable for injuries caused by the negligence of a fellow servant. *Id.*
9. Section hands distributing ties along the track by loading them upon a push car, shoving same along the track and throwing off ties therefrom at points where they were needed, were engaged in operating a car within the meaning of the Act of June 18, 1897 (Laws Twenty-Fifth Leg., Called Session, p. 14.) The company was liable for injury to one of such employees by the negligence of another in causing a tie to be thrown upon him in such unloading. It was not necessary that the car be moving while the tie was being thrown off to render the injury one received in its operation. *Freeman, Receiver, v. Shaw*, 294.
10. The status of a foreman having authority to direct and control subordinates in their work as a vice principal with respect to them, is not concluded adversely to such relation by the fact that his power to employ and discharge was subject to the approval of the president of the employing company. *Sullivan-Sanford Lumb. Co. v. Cooper*, 536.
11. The foreman in charge of a lumber mill and having authority to direct the work of its employes, the machinery being stopped to repair a break, sent an incompetent and inexperienced employee to do certain work among intricate machinery with which he accidentally worked a lever which set the machinery in motion and caused the death of an employee engaged in its repair. The negligence relied on in a suit by the widow to recover for his death was in detailing the incompetent servant for such service. Held, that a requested instruction denying recovery in case the foreman did not have authority to hire and discharge employees without consulting the superior officer was properly refused. *Id.*
12. Where, in a suit by a parent for damages for the negligent killing of his son, the plaintiff pleads and introduces evidence tending to show that the son was injured by the negligence of a coworker, but does not charge the defendant with negligence in the selection of the coworker, it was error to permit the defendant to introduce testimony to the effect that the coworker was a good and careful man and did his work well. *Dye v. Chicago, R. I. & G. Ry. Co.*, 614.
13. In a suit by a railroad machinist against his employer, a railroad company for damages for personal injuries caused by his stepping upon some rolling object on the floor of the machine shop and being thereby thrown into an ash pit and burned, the following principles must apply and control: First, that it was the duty of the employer to exercise ordinary care to furnish the employee a reasonably safe place in which to work; second, that a defect existed in the place furnished; third, that the defect was of such character that ordinary care on the part of the employer would have discovered and remedied it; and fourth, that the negligence of the employer proximately caused the injury complained of. A failure to prove any one of said facts would be fatal to a right to recover. Evidence considered and held insufficient to show negligence on the part of the employer. *St. Louis, S. F. & T. Ry. Co. v. Cason*, 323.
14. While it is a correct proposition of law that negligence of a railroad company can not be predicated on moving a train of cars without notifying an employee who is engaged in an act on and about the cars for which he was not employed, in the absence of evidence that the company knew

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or ought to have known of the perilous situation of the employee, the refusal of a requested charge involving said proposition is proper when to give it would involve an assumption that the employee was not in the line of his duty when injured, said fact being an issue under the pleading and evidence. *El Paso & S. W. Ry. Co. v. Welter*, 22.

15. The servant never assumes the risk of his master's negligence unless he is chargeable with notice of the same and can reasonably anticipate a concomitant danger, and the burden is on the master to prove such knowledge. *Id.*
16. Rule of a railroad company requiring a blue flag by day and a blue light by night to be displayed at one or both ends of a train of cars when workmen are under and about it, held to have no application to a case wherein the foreman of a switch engine, before moving a train of cars, went under one of the cars which was marked "in bad order," to ascertain whether it could be coupled and moved. *Id.*
17. The principle that it is not the duty of the master to warn a servant of danger unless he knows or by the exercise of ordinary care ought to know the danger to which the servant is exposed, has no application to a case where the danger arises and the injury is caused from the negligent act of the master himself or of those whose negligent acts are attributable to him. *Id.*
18. It is the duty of the master to warn his servant of dangers incident to his employment, unless they are such as he has a right to assume that the servant has knowledge of or will acquire knowledge of before he incurs them. *Texarkana & F. S. Ry. Co. v. Brandon*, 451.
19. If the dangers are such as may be said to be obvious to a person of ordinary intelligence, or if they are ordinary ones incident to service the employee has contracted to perform, and so impliedly represented himself as competent to perform, in the absence of anything to show the contrary, the master may assume that the servant will understand and appreciate them, and he need not warn the servant. But where the dangers are not obvious, and where the servant has not contracted to perform the service, the master has no right to assume that the servant will know and appreciate the danger and should act on the assumption that he is ignorant and warn him thereof. Bering Mfg. Co., v. Femelet, 35 Texas Civ. App., 36; Gulf, C. & S. F. Ry. Co. v. Newman, 27 Texas Civ. App., 77; Houston & T. C. Ry. Co. v. Strycharski, 35 S. W., 851, distinguished. *Id.*
20. A negro, who had previously worked as a section hand or common laborer, having been employed two or three weeks at a railway round house in cleaning up about the round house and foreman's office, was directed by the foreman to get into the pit under an engine and loosen with a wrench a plug in the bottom of the boiler of a locomotive engine for the purpose of draining it. In so doing he was scalded by steam and hot water escaping from the boiler when the plug was loosened. He was ignorant of machinery, of the structure of the engine and the fact that the boiler then contained hot water and of the danger incident to loosening the plug. Held, that an instruction that he could recover under these circumstances if the foreman failed to warn him of the danger was proper without requiring a finding also that the foreman knew he was ignorant thereof. *Id.*
21. Though the servant is performing an act within the scope of his employment, the master setting him at the specific duty is liable for failure to warn him of dangers therein if they are known to the master and he has reason to believe that they are unknown to the servant by reason of his inexperience in the work or ignorance of the circumstances. Facts considered and held to show that the foreman directing plaintiff to perform the work was chargeable with notice of his ignorance of danger and the necessity of warning him. *Id.*
22. Evidence considered and held insufficient to raise the issue of assumed risk or that of contributory negligence on the part of the injured servant. *Id.*
23. A servant who engages in a task outside the scope of his employment and involving greater dangers of which he is ignorant, doing so at the direc-

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tion of the foreman on account of the absence of the employe charged with that particular duty, does not assume the risk. *Id.*

24. Negligence of a vice-principal (foreman of a lumber mill) in performing a nondelegable duty of the employer to his subordinate will support a recovery against the latter under the statute (Rev. Stats., art. 3017, sec. 2) for death caused by the negligence of such employer. *Sullivan-Sanford Lumb. Co. v. Cooper*, 536.
25. The selection of an incompetent servant to do work about intricate machinery of the relations and details of which he was ignorant, and which by reason thereof he accidentally set in motion, causing the death of another employe engaged in repairing it, was properly left to the jury to determine the question of negligence in such selection as one of fact. *Id.*
26. Evidence considered in case of a servant killed while repairing a break in machinery of a lumber mill by the starting of the machinery in motion through negligence attributable to the employer, and held to disclose no evidence of the contributory negligence on his part nor anything constituting an assumption of the risk by him as matter of law. *Id.*
27. Evidence as to the master's knowledge of the servant's incompetency to perform the work he was directed to do, about complicated machinery which he did not understand, considered, and held that it was not reversible error for the court in his charge to assume the existence of such knowledge. *Id.*
28. A requested instruction on the issue as to the competency of the servant was properly rejected where it made the test his ability to do the simple act he was directed to perform when the issue was as to his fitness to perform it among intricate machinery of the details and relations of which he was ignorant. *Id.*
29. The master is not relieved from responsibility to a servant for injury by his negligence because the negligence of a fellow servant of the injured person contributed to the result. *Id.*
30. An employee is never required to exercise ordinary care to discover defects in machinery or implements furnished him by his employer, or to discover unknown dangers arising from their use in the manner directed by his superior. Hence a charge imposing this duty on an employee in a suit by him for damages for personal injuries received in "throwing" a belt in obedience to orders, with the danger of which he was not familiar, was reversible error. *Gentry v. Stephenville Oil Mill*, 374.
31. When an employee acts suddenly on an imperative order enjoining instant obedience, and the danger is not certain, the issues of negligence and assumed risk are for the jury, even though the employee may be experienced. *Id.*
32. The servant does not assume the risk of defect in the appliances of the business (absence of lock on a railway switch) by knowledge of and failure to report such defect, when it is also known to the master or his employee charged with the duty of repair. *International & G. N. R. Co. v. Clark*, 82.
33. The servant of a railway company does not assume the risk of injury from a defect in the machinery known to him, by continuing in his employment with such knowledge, unless such course involved a lack of ordinary care on his part. (Act of April 24, 1905, Laws 29th Leg., p. 386.) *Id.*
34. Although an employee knows that machinery which he is using is defective, he does not assume the risk arising from its use after he has informed his employer of the defect and the employer has promised to repair the same, so long as he has reasonable ground to expect and does expect the employer to fulfill his promise, and provided that a man of ordinary prudence would have continued the service under all the circumstances. *Medlin Milling Co. v. Schmidt*, 318.
35. In a suit by an employee against his employer for damages for personal injuries caused by his hand being caught in revolving wheels over which there was no guard to prevent such an occurrence, evidence considered and held sufficient to support a finding that plaintiff was entitled to

Master and Servant—*Continued.*

recover, although he knew of the defect in the machinery with which he was required to work. *Id.*

36. The terms "defect and danger" as used in the Act of 1905 (Gen. Laws, 1905, p. 386), abolishing the defense of assumed risk in suits by railroad employees for personal injuries, are broad enough to include and do include any defective or improper and dangerous manner in which a railroad train may be made up and operated, resulting in injury to an employee. *Rice & Lyons, Receivers, v. Lewis*, 274.

Measure of Damages.

Conversion of mortgaged property. See *Damages, 1.*
Preparations to carry out contract. See *Damages, 3.*
Discharge of employee. See *Damages, 4.*
Destruction of house. See *Damages, 5.*
Injury to crop and soil. See *Damages, 6.*
Spreading Johnson grass. See *Damages, 7.*
Injury to cattle in transportation. See *Damages, 10, 11.*
Sale of land. See *Vendor and Purchaser, 8.*

Mechanics Lien.

Priority of payment. See *Receivers, 7.*

Mental Anguish.

By exposure to infectious disease. See *Telegraph, 5, 6.*

Minors.

Disaffirmance of contract. See *Infancy, 1, 2.*
Plea of minority. See *Judgment, 8.*
Trespassing on train. See *Master and Servant, 4.*

Mistake.

In order for goods. See *Contract, 12.*
In entering judgment. See *Judgment, 6.*
In transmission of message. See *Telegraph, 7, 8, 9.*

Mortgage.

Conversion of property. See *Conversion, 1.*
Purchaser at foreclosure. See *Corporation, 1.*
Limitation of action on. See *Foreclosure, 1, 2.*
Absolute deed. See *Homestead, 6.*
Money borrowed to discharge lien. See *Homestead, 7.*
Money borrowed for improvements. See *Homestead, 8.*
Trustees sale. See *Homestead, 9-12.*
Attachment of property. See *Intervention, 1.*
Priority of payment. See *Receivers, 2-9.*

1. When there is no provision in a deed of trust that it shall cover any advances outside of the amount of the note therein named, it can not be made to cover such; but if the note named in the deed of trust was made and intended to cover future advances as well as present indebtedness, then, to the extent of the amount of the note, the deed of trust would cover such indebtedness. *Openshaw v. Dean*, 499.

Motion.

To instruct verdict. See *Practice in Trial Court, 2.*

Municipal Corporation.

Assessment for street improvement. See *Cities, 1-3.*

Names.

Amendment correcting initials. See *Limitation, 1.*

Navigable Waters.

Obstruction of. See *Damages, 2.*

Navigable Waters—*Continued.*

1. An artificial navigable canal connecting navigable streams with tide water, is a highway of commerce, and, therefore, under the jurisdiction of the Federal government. A corporate owner of such canal would not have the right to obstruct or otherwise destroy the same to prevent the pollution of the navigable stream. *Bigham Bros. v. Port Arthur C. & Dock Co.*, 367.
2. The controlling question in determining whether a particular stream is a navigable public highway is its capacity for use as a highway rather than the extent and manner of the use. If it be capable in its natural state of being used for the purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact and becomes in law a public river or highway. *Orange Lumb. Co. v. Thompson*, 562.
3. If a stream is of sufficient capacity for the floating of rafts and logs in the condition in which it generally appears by nature, it will be regarded as public, notwithstanding there may be times when it becomes too low and shallow for that purpose. *Id.*
4. A stream or body of water about a mile in length, about 300 feet wide where it empties into a larger stream, six or eight feet deep for half its length, and deeper than that for its entire length during periods of high water, and used by the public for floating logs and rafts to market, is a navigable stream. There can be no private ownership in the bed of such a stream and those exclusively appropriating or obstructing the same would be liable in damages to others injured thereby. *Id.*

Negligence.

Furnishing feeding pens for stock. See *Carriers of Goods, 3.*
Presumption from derailment. See *Carriers of Passengers, 1.*
Affording time to board train. See *Carriers of Passengers, 2, 3.*
Of express company injuring passenger. See *Carriers of Passengers*, 4.
Excuse for delay in transportation. See *Evidence, 17, 18.*
Opinion as to probable conduct. See *Evidence, 20, 21.*
Efficiency of spark arresters. See *Evidence, 27.*
Issues confined to fault alleged. See *Instructions to Juries, 2.*
Realizing peril of position. See *Instructions to Juries, 4.*
Giving undue emphasis to allegations. See *Instructions to Juries, 11.*
Knowledge of negligent character of coservant. See *Instructions to Juries, 24.*
Burden of proving contributory negligence. See *Instructions to Juries, 28.*
Permitting Johnson grass to mature. See *Instructions to Juries, 30.*
Assuming defendant's negligence. See *Instructions to Juries, 31.*
Voluntary exposure to danger. See *Insurance, Accident, 2-4.*
In failure to make defense. See *Judgment, 9.*
Liability of master for servant's act. See *Master and Servant, 1, 8.*
Authority of brakeman. See *Master and Servant, 4.*
Concurring negligence of fellow servant. See *Master and Servant, 7, 29.*
Servants operating car. See *Master and Servant, 9.*
Orders of foreman. See *Master and Servant, 11.*
In selection of fellow servant. See *Master and Servant, 12.*
Furnishing safe place to work. See *Master and Servant, 13.*
Scope of servant's duties. See *Master and Servant, 14, 21, 23.*
Assumed risk. See *Master and Servant, 15, 22, 23, 26, 30-36.*
Rules as to signals. See *Master and Servant, 16.*
Duty to warn of danger. See *Master and Servant, 18-23.*
Master's knowledge of danger. See *Master and Servant, 19.*
Servant's knowledge of danger. See *Master and Servant, 20.*
Contributory negligence. See *Evidence, 21; Instructions to Juries, 28, 30; Master and Servant, 4, 7, 19-22, 26, 29, 31, 33-36.*
Act of vice-principal. See *Master and Servant, 24.*
Employing incompetent servant. See *Master and Servant, 25-29.*
Knowledge of defect and danger. See *Master and Servant, 30-36.*
Promise to repair machinery. See *Master and Servant, 34, 35.*
Preparation for trial. See *New Trial, 1.*

Negligence—*Continued.*

Suit by owner of grass burned. See *Parties, 1.*
Res ipsa loquitur. See *Pleading, 4, 5.*
Allegation of negligence. See *Pleading, 10.*
Derailment of street car. See *Question of Fact, 2.*
Killing stock. See *Railways, 6, 7, 8.*
Escape of fire. See *Railways, 9, 10, 11.*
Causal connection with injury. See *Telegraph, 1.*
Delivery beyond limits. See *Telegraph, 2, 4.*
Unrepeated message. See *Telegraph, 8.*
Joint wrongdoers. See *Trespass, 1.*

1. While it is a correct proposition of law that negligence without resulting injury is not actionable, charge of the court considered and held to sufficiently state said proposition and to justify the court in refusing a special charge to the same effect. *Missouri, K. & T. Ry. Co. v. Wasson Bros.*, 240.
2. The following rule of res ipsa loquitur approved: "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care." *St. Louis, S. F. & T. Ry. Co. v. Cason*, 323.
3. In a suit by a surviving widow against a railroad company for the death of her husband, it was shown by the evidence that deceased alighted at one of defendant's stations on a dark night for the purpose of going to the house of a relative about 150 yards distant; he was afterwards found in an unconscious condition lying at the bottom of a gully or gulch and near the railroad bridge that crossed the same in the direction of the relative's house; he died next morning without explaining how he came to fall in the gully, and there was no evidence explaining the occurrence. Held, the facts that there were nails extending from some of the planks of the bridge, and that the bottom of one of deceased's shoes was torn, together with other facts above stated, were not sufficient to warrant the jury in inferring that the deceased was walking over the bridge and struck his shoe against a nail projecting therefrom and was caused to fall from the bridge, and the court properly instructed a verdict for defendant. *Coffman v. Texas Mid. Railroad*, 387.
4. The causal connection between a negligent act or omission and an injury must be proved; it can not be presumed. *Id.*
5. The question of contributory negligence is one of fact, the burden of proving which is upon the defendant who alleges it as a defense, and unless the state of the evidence is such that no fairminded man of ordinary intelligence can reach any other conclusion from it than that the party charged with it was guilty, which can very rarely be the case, such question must be determined by the jury. *El Paso & S. W. Ry. Co. v. Welter*, 22.
6. A track worker was injured by being struck and thrown under the wheels by a trap door projecting from the side of the car on a passing gravel train. He knew of the approach of the train and of the projecting trap door, but erroneously supposed that he had stepped far enough from the track to clear it. Held, that there was no room for difference of opinion as to his contributory negligence, and a peremptory instruction to find for defendant was properly given. *Santis v. St. Louis S. W. Ry. Co.*, 405.
7. Except when the evidence is undisputed, the issues of negligence and contributory negligence are always issues of fact to be determined by the jury. In a suit by a railroad employee for personal injuries caused by the derailment of a railroad logging train, while being operated in the usual and customary manner well known to the plaintiff, evidence considered and held to require the submission of the issues of contributory negligence and assumed risk to the jury and sufficient to support their finding against the defendant. *Rice & Lyon, Receivers, v. Lewis*, 274.

Negligence—*Continued.*

8. It does not necessarily follow that an employee will be guilty of contributory negligence by continuing in employment where he is exposed to dangers from the negligence of the employer in the matter of defects in the appliances and machinery furnished the employee even though the employee has knowledge thereof. It is always a question whether a person of ordinary care would have so continued. *Id.*
9. Evidence considered and held to support a verdict for defendant in a case where one lying insensible upon a railway track at a point remote from stations was struck and injured by a train. *Epperson v. International & G. N. R. Co.*, 66.
10. One falling insensible upon a railway track, without negligence, would not be precluded from recovery for injury caused by negligence of those operating a train, as by their failure to keep a lookout for persons on the track where the circumstances require such lookout as an exercise of ordinary care. But if the injured person knew himself to be liable to sudden attacks of unconsciousness and his act in entering and walking along the track with such knowledge be found to be negligence, then, if rendered insensible there by such weakness, his negligence would prevent his recovery for injury caused to him in such situation by defendant's negligent failure to discover him in time; defendant in such case could become liable only under the rule applicable in cases of discovered peril. See charges approved as a correct presentation of these principles. *Id.*
11. A railway has the right to run its train at such speed as it chooses at points between stations, so far as concerns the rights of trespassers or licensees walking or lying on its track. See charge to this effect approved. *Id.*
12. One voluntarily lying down to sleep on a railway track is guilty of negligence precluding his recovery for injuries caused by negligence of those operating trains thereon. Charge approved and held warranted by evidence. *Id.*
13. Evidence considered and held sufficient to raise and require the submission of the issue as to contributory negligence by plaintiff in entering on and walking along a railway track with knowledge of his liability to attacks rendering him unconscious. *Id.*
14. In a suit by a locomotive engineer against a railroad company for damages for personal injuries caused by a collision of his engine with cars which were upon a side track but too near the main track for the engine to clear, evidence considered and held sufficient to support a finding by a jury that the cars upon the side track were so manipulated and moved by defendant's employees, notwithstanding they testified to the contrary, as to cause them to run down too near the main track and so bring about the collision; that the acts of said employees on and about said cars were within the scope of their employment; and that the evidence did not raise the issue of the cars having been tampered with by some one not in the defendant's employment. *Houston & T. C. R. Co. v. Bryan*, 98.
15. Where a locomotive engineer was injured while attempting to leave the cab of his engine in view of an imminent collision, and the issue being whether or not he was guilty of contributory negligence in so doing, the court charged the jury as follows: "In determining the question whether plaintiff was guilty of negligence either in attempting to leave the engine, or in the manner in which he attempted to leave it, or in not remaining in the engine, you will consider what a man of ordinary prudence would have done in view of the danger under the circumstances." Held, not subject to the objection that it was upon the weight of the evidence. *Id.*

New Trial.

Review of guardian's accounts. See *Guardian and Ward*, 1-7.
Appointment of surveyor. See *Surveyor*, 1.

1. Facts considered and held not to show error in refusal of a motion for new trial on the ground of newly discovered evidence in regard to a

New Trial—*Continued.*

disputed boundary line, the facts being ascertainable and the necessity for inquiry into them obvious before trial. *Ramseaur v. Ball*, 285.

Newly Discovered Evidence.

Diligence to procure. See *New Trial, 1.*

Non-suit.

Not an adjudication. See *Judgment, 7.*

Notes and Bills.

Permit to do business in State. See *Foreign Corporation, 1.*
Given on dealings in futures. See *Gaming Transaction, 1.*
Payable without interest. See *Interest, 1.*
Dismissal as to insolvent party. See *Judgment, 3.*
Failure to indorse credit. See *Judgment, 9.*
To secure future advances. See *Mortgage, 1.*
Extension of time on. See *Principal and Surety, 1.*
Unlawful interest. See *Usury, 1, 2.*
For purchase money of land. See *Vendor and Purchaser, 4-7, 9.*
Expense of collection. See *Attorney's Fee, 1.*
Reason for refusing payment. See *Estoppel, 2.*

16. In a suit against a railroad company for damages for the death of an infant caused by the backing of a train which had been stopped across a street at or near a station, evidence reviewed and held (1) sufficient to support a finding that the defendant was guilty of negligence in not exercising ordinary care to ascertain whether its track was clear before backing the train; and (2) that the parents of the child were not guilty of contributory negligence as matter of law in permitting the child to wander from its home and be upon the track. *Texas & N. O. R. Co. v. Brouillette*, 337.
17. Evidence in case of plaintiff who drove upon a railway crossing after discovering an approaching train, assuming that he had time to cross, and not looking further to discover the distance of the train, considered, and held to show contributory negligence precluding him from recovery. *Texas & P. Ry. Co. v. Johnson*, 354.
18. Where the plaintiff, injured by collision with a train at a crossing, had otherwise knowledge of its approach, the fact that signals for the crossing were omitted was immaterial. *Id.*
19. In a suit for damages for personal injuries caused by the explosion of a boiler, it is incumbent on the plaintiff not only to prove that the explosion was due to a defective boiler, but also by direct or circumstantial evidence that the defective condition was capable of being known to defendant upon the proper performance of the duty of inspection. *Galveston, H. & S. A. Ry. Co. v. Senn*, 15.
20. In a suit for damages caused by the explosion of a boiler, it being shown by the testimony that the explosion was due either to low water in the boiler or to a defective boiler, and the jury having discarded the theory of low water, circumstantial evidence considered, and held to support a finding by the jury that the explosion was due to a defective condition of the boiler, and that said condition could and would have been discovered by a proper inspection. *Id.*
21. Where the court required the jury to find that the defendant was guilty of negligence in putting plaintiff in control of an engine with a defective boiler before they could render a verdict for plaintiff, the charge was sufficient on the subject of negligence, and the defendant could not complain of the same in the absence of a request that the jury be instructed in any particular detail of the subject. *Id.*
22. In an action for injury to plaintiff's land and crops by oil negligently permitted by the proprietor of a pipe line to escape therefrom upon the land, it was not proper to instruct a verdict for defendant on the ground of lack of evidence of negligence, in the construction and maintaining the pipe line, where the pleading and proof also presented an issue as to defendant's negligence in failing to prevent the oil from com-

Notes and Bills—*Continued.*

ing onto plaintiff's land after its escape from the pipes. *Gulf Pipe Line Co. v. Brymer,* 40.

Notice.

Of grantor's intent to defraud. See *Fraud, 3.*
To officers or directors of corporation. See *Gaming Transaction, 1.*
By continued possession of grantor. See *Homestead, 6.*
Precautions exciting suspicion. See *Homestead, 11.*
Of application for injunction. See *Injunction, 1.*
Burden of proving. See *Innocent Purchaser, 1.*
Facts putting on inquiry. See *Innocent Purchaser, 2.*
Of claim for damages. See *Telegraph, 3.*
From contents of message. See *Telegraph, 7.*

1. When the employment of an attorney is simply to prepare the deed and examine the title to a tract of land for a prospective purchaser, knowledge that the attorney may have acquired prior to and independently of that employment as to the fraudulent intent of the vendor of the land, can not be imputed to the client. *Rogers v. Driscoll,* 416.
2. The possession of one claiming land under a verbal sale would be notice to a subsequent purchaser that he claimed title, but possession would not be notice to such purchaser of an unrecorded deed of trust, and the title acquired by foreclosure of the trust deed could not prevail against such purchaser for a valuable consideration without notice. *Openshaw v. Dean,* 499.
3. A debtor conveyed a town lot to a third party who neglected to put his deed on record; subsequently a judgment was obtained against the debtor and the same was duly abstracted and recorded; at the time of the conveyance to the third party the debtor had a tenant in actual possession of the lot who thereupon attorned to the third party or his vendee and thereafter paid him the monthly rentals as they accrued; this was the situation at the time the judgment was obtained and recorded and the land sold under execution issued on said judgment. Held, the judgment creditor and the purchaser at execution sale were charged with notice of the unrecorded deed by reason of the possession of the tenant holding under the third party. *Garth v. Stuart,* 391.
4. It is incumbent on one about to buy land to inform himself of the rights of the occupant or of the landlord of the occupant at that very time; he must not rest on the assumption that parties are occupying under the same right as formerly. *Id.*

Nuisance.

Remand or rendition of judgment. See *Practice on Appeal, 16.*

1. A horse which, the owner being absent, became down and helpless in a livery stable with an incurable disease and offensive to the neighborhood, constituted a nuisance which demanded abatement, and neither the city, its officers, nor individuals, incurred liability, to the owner by having it killed and the body removed and burned. *Mezlar v. City of Miles,* 13.
2. In order for an individual to obtain equitable relief for abatement of a public nuisance, such as an encroachment upon the sidewalk by a building of a proprietor of lots adjoining his own, he must show a substantial and special injury to him thereby, different from that to the public generally. *Ingram v. Turner,* 7.
3. The proprietor of a city lot and business house sued the city and an adjoining proprietor for the abatement of a nuisance created by the latter, with acquiescence of the city, in erecting a show window in front of his establishment, encroaching fifteen inches upon the sidewalk and alleged to interfere with travel thereon and with the view into and from plaintiff's establishment. Held, that in the absence of a statement of facts, a finding of the jury that the structure complained of did not materially depreciate the market or rental value of plaintiff's premises was conclusive upon the appellate court, and was ground for denying

Nuisance—*Continued.*

the relief sought, though some interference, of the character alleged, necessarily resulted from such structure. *Id.*

4. In an action to abate the operation of a cotton gin as a nuisance to plaintiff, a resident on an adjoining lot, it was proper for defendant to prove the value of his plant. The question of right to abate was one of reasonable use of property, and the comparative injury to plaintiff by its continuance and to defendant by its discontinuance was material. *Gose v. Coryell*, 504.
5. One is not estopped from seeking the abatement of a nuisance (the operation of a cotton gin adjacent to his residence and interfering with its enjoyment by dust and lint thrown thereon and by noise and vibration of machinery) by the mere fact that he has permitted such operation for years without objection. To constitute estoppel his conduct must have induced the defendant to alter his position, to his prejudice in the event of abatement. *Id.*
6. The right to maintain on one's property a nuisance injuring that of an adjoining proprietor is not acquired merely by its long continued maintenance without objection. Prescription is applicable to rights exercised upon the property of another, not on that of the person relying on it. It would not begin to run until the maintenance of the nuisance injuriously affected the adjoining proprietor's use of his property, as where the latter built and occupied a residence thereon, the use of which was interfered with. *Id.*
7. Findings of fact in an action to abate a cotton gin as a nuisance to the resident on an adjoining lot held not to show estoppel by plaintiff or the acquiring of a right in defendant by prescription to maintain the nuisance. *Id.*
8. The fact that the maintenance of a certain industry, such as the ginning of cotton, on the premises of the proprietor, inflicts injury upon an adjoining lot owner in the enjoyment of his residence, will not, alone, give him the right to have such industry abated as a nuisance. The question is one of reasonable use of one's own premises; all the circumstances are to be considered, including the nature of the locality as industrial or residence property, the possibility of finding a more appropriate location and the comparative injury to either by continuance or abatement respectively. *Id.*

Offset.

Affidavit to claim against estate. See *Administration, 6.*

1. An action for damages by one tort can not be offset by damages from another. *McCormick v. Schtrenck*, 139.
2. In an action by a husband and wife for assault by defendant upon the latter, his plea in reconvention for damages by a subsequent assault on him by the husband was inadmissible and exceptions thereto should have been sustained. *Id.*

Oil.

Escape from pipe line. See *Negligence, 22.*

Omission.

To submit issue. See *Special Issues, 3, 4.*
Of number of survey in description. See *Taxation, 2.*

Operating Expenses.

Receivership of railway. See *Receivers, 2-9.*

Operating Train.

Push car distributing ties. See *Master and Servant, 9.*

Opinion.

Hypothetical question. See *Evidence, 14.*
Substance of conversation. See *Evidence, 15.*
Of expert not conclusive. See *Evidence, 16.*

Opinion—*Continued.*

As to amount of damages. See *Evidence, 19.*
As to probable conduct. See *Evidence, 20, 21.*
As to skill displayed. See *Evidence, 24.*

Outstanding Title.

Claiming under common source. See *Trespass to Try Title, 2.*

Overflow.

Spread of Johnson grass. See *Damages, 7, 8.*
Causal connection. See *Instructions to Juries, 20.*

Ownership.

Consignor and consignee. See *Carriers of Goods, 1.*
Oral proof of. See *Evidence, 5.*

Parol Evidence.

To alter written contract. See *Written Instrument, 1.*

Parties.

Right to intervene. See *Intervention, 1, 2.*
Omission on justice's docket. See *Pleading, 3.*
1. The owner of grass growing upon land (in this instance, a lessee) may sue to recover damages for its negligent destruction by fire, although he was not the owner of the land. *Texas & P. Ry. Co. v. Pippin,* 477.

Partition.

Of estate by heirs. See *Administration, 1.*
Improvements by joint owner. See *Trespass to Try Title, 4.*
1. Where the owner of land conveys first an undivided one-half of the same, and subsequently conveys a specific part of the tract, in a partition between the owner of the undivided interest and the owner of the specific part, the specific part will be awarded to the purchaser, he being in actual possession and enjoyment of the same and no injury resulting thereby to the owner of the undivided interest. *Bond v. Garrison,* 620.

Partnership.

Judgment against. See *Judgment, 2.*
Between connecting lines. See *Railways, 3, 4.*
Imputed knowledge of partner. See *Telegraph, 9.*

Passengers.

Presumption of negligence from derailment. See *Carriers of Passengers, 1.*
Allowing time to board train. See *Carriers of Passengers, 2, 3.*
Injured by negligence of express company. See *Carriers of Passengers, 4.*

Payment.

Application of. See *Homestead, 9.*
Of dues in benevolent order. See *Insurance, Life, 1.*
Failure to indorse credit. See *Judgment, 9.*
Of taxes on land. See *Limitation, 5.*
Sale under deed of trust. See *Powers, 4.*

Penalties.

For unlawful interest. See *Usury, 1.*

Pending Suit.

Plea in abatement. See *Abatement, 1.*

Performance.

Agreement as to place. See *Contract, 4; Venue, 1, 2.*
Agreement as to time. See *Contract, 5.*

Personal Injury.

Double recovery. See *Damages, 15.*
Verdicts held not excessive. See *Damages, 16-19.*
Causal connection. See *Instructions to Juries, 25.*
Diminished earning capacity. See *Pleading, 9.*

Plea of Privilege.

To be sued in county of residence. See *Venue, 1-4.*

1. Under the Act of the Thirtieth Legislature (Laws, 1907, p. 249) when a plea of privilege to be sued in a different county is sustained, the suit should not be dismissed but an order should be entered transferring the suit to the county and court to which the venue was changed. *Harris Millinery Co. v. Bryan,* 478.

Pleading.

Jurisdiction of court. See *Amount in Controversy, 1-5.*
Expenses of collection. See *Attorney's Fee, 1.*
Vouching in warrantor. See *Citation, 1.*
Injuries resulting in death. See *Damages, 14.*
As evidence against pleader. See *Evidence, 7.*
Permit to do business. See *Foreign Corporation, 1.*
On bill of review. See *Guardian and Ward, 2.*
Irreparable injury. See *Injunction, 3, 4.*
Negligence not alleged. See *Instructions to Juries, 2.*
Charge ignoring issue. See *Instructions to Juries, 10.*
Abandoned pleadings. See *Practice on Appeal, 7.*
Suit on express contract. See *Quantum Meruit, 1.*
Improvements on property. See *Trespass to Try Title, 4.*
Evidence varying from. See *Variance, 1.*
Offer to do equity. See *Vendor and Purchaser, 6, 7.*

1. The answer of a defendant consisted of a general and special exception, a plea to the jurisdiction, and a general denial, all contained on one page and all filed at the same time. A motion to strike out the plea to the jurisdiction on the ground that it was not filed in due order of pleading, was properly overruled. *Garth v. Childs,* 487.
2. When a general demurrer to a petition is sustained, it is not incumbent on the plaintiff to amend his petition so as to meet the ruling of the court sustaining a special exception also. *Hammond v. Clwer,* 611.
3. The omission by clerical error in the statement on the docket of the name of one of the members of the plaintiff firm, which was properly given in the citation and judgment in Justice Court, does not make it error to render judgment in his favor on the trial on appeal. *Higgins Mill & El. Co. v. Gossett,* 136.
4. Where plaintiff pleads specifically the acts of negligence by defendant relied on, he must prove such negligence and can not rely on a general inference of negligence from the happening of the injury under the doctrine res ipsa loquitur. *Gulf Pipe Line Co. v. Brymer,* 40.
5. Where the inference of defendant's negligence from the happening of the accident can be referred as well to a negligent act or omission not pleaded as to the specific negligence alleged, the maxim res ipsa loquitur is not applicable. *Id.*
6. Objection to the sufficiency of description of land can be made by general demurrer only when it is manifest from the face of the petition that it can not be identified. *Plummer v. Marshall,* 650.
7. Plaintiff having alleged that he was injured by steam and hot water escaping from the boiler on his removing the plug in the bottom of it as directed by the foreman, no variance appeared in the proof that, having loosened and partly taken out the plug, it then blew out by the pressure of steam in the boiler. De La Vergne Refg. Co. v. Stahl, 54 S. W. 40, distinguished. *Texarkana & F. S. Ry. Co. v. Brandon,* 451.
8. Plaintiff having alleged and shown facts entitling him to recover though the work he was performing by direction of his foreman was within the scope of his employment, he was entitled to have the issue of liabil-

Pleading—*Continued.*

ity on that theory of the case submitted, though he had also alleged that the work was such as he had not been employed to do. *Id.*

9. In a suit for damages for personal injuries plaintiff alleged that she had an earning capacity of $50 per month previous to her injuries, with a reasonable expectation of increasing the same, but that since her injuries she has been bed-ridden and unable to perform any kind of labor and that the injuries were permanent. Held, sufficient to present the issue as to future earning capacity. *San Antonio Trac. Co. v. Probandt*, 265.
10. In a suit to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, if the plaintiff's petition specifies the particular acts of negligence relied on, no other acts of negligence should be submitted to the jury as ground of recovery. In such a suit, charge considered, and held subject to the objection that it failed to submit to the jury the specific grounds of negligence alleged in plaintiff's petition, but in general terms instructed a verdict for the plaintiff if the negligence of the defendant was the proximate cause of the injury. *Galveston Elec. Co. v. Dickey*, 472.

Possession.

Of grantor after conveyance. See *Homestead, 6.*
Restoration to owner. See *Injunction, 1, 4.*
Continuity of. See *Limitation, 6.*
Boundaries of. See *Limitation, 7.*
As notice of unrecorded deed. See *Notice, 2, 3, 4.*
Purchaser of undivided interest. See *Partition, 1.*
Verbal sale of land. See *Statute of Frauds, 1.*
As evidence of title. See *Trespass to Try Title, 1.*

Powers.

Resignation by executor. See *Executors, 1.*
Sale by trustee. See *Foreclosure, 2.*
Of executor to sell. See *Wills, 1.*

1. The power to sell is not inherent in the office of trustee; he has such powers only as are conferred by the instrument either expressly or by clear implication. A mere direction to divide property will not confer the power to sell; there must be some duty imposed the performance of which would require a sale. *Wisdom v. Wilson*, 593.
2. A sale of land by executors considered and held invalid and unauthorized by the will under which they acted when construed as a whole. *Id.*
3. The power to sell land does not of itself imply authority to sell on credit; the presumption is that the sale is to be made for cash. But when the agent is authorized to sell on such terms as to him shall seem meet, he may grant a reasonable credit. A will construed as a whole, and held not to confer power upon the executors to sell land of the estate for one-fifth cash and the balance on credit, with the last payment maturing four years after date of sale. *Id.*
4. A trustee has no power to sell property under a deed of trust after the debt to secure which the deed of trust was given has been paid. *Girardeau v. Perkins*, 553.
5. A sale of property by a trustee in a deed of trust within four years after the death of the grantor is void. The doctrine announced in Rogers v. Watson (81 Texas, 403) will not be extended so as to make valid after the lapse of four years a trustee's sale which was made within four years. *Id.*
6. The death of the grantor in a deed of trust revokes the power of the trustee to sell, and the purchaser at such sale is charged with notice of the fact of the grantor's death when such is the case. *Id.*
7. Intimated that the rights of a purchaser at a sale under a deed of trust who pays value and who has no notice that the debt which the deed of trust was given to secure had been paid at the date of the sale, can not be affected by that fact. *Id.*
8. Neither the death of the grantor in a deed of trust nor the fact that the

Powers—*Continued.*

debt is barred by limitation will conclusively prevent the execution of the power to sell given to the trustee. *Openshaw v. Dean*, 498.

Practice.

Rulings on this subject are arranged under more specific heads. See *Abatement, 1; Administration, 1, 2, 5, 6; Administrator, 1; Amount in Controversy, 1-5; Appeal, 1-5; Argument of Counsel, 1-3; Assignments of Error, 1-3; Bills of Exception, 1; Briefs, 1-6; Continuance, 1, 2; Costs, 1; Cross-Examination, 1; Divorce, 1; Eminent Domain, 1; Executors, 1; Findings, 1, 2; Foreclosure, 1, 2; Garnishment, 1; Guardian and Ward, 1-7; Harmless Error, 1, 2; Impeachment of Witness, 1, 2; Injunction, 1-8; Instructions to Juries, 1-31; Intervention, 1, 2; Judgment, 1-10; Jurisdiction, 1; Jurors, 1-5; New Trial, 1; Nuisance, 3; Plea of Privilege, 1; Pleading, 1-10; Practice in Trial Court, 1-3; Practice on Appeal, 1-17; Quantum Meruit, 1; Question of Fact, 1, 2; Receivers, 1-9; Special Issues, 1-4; Special Judge, 1; Surveyor, 1; Trespass to Try Title, 1-4; Variance, 1; Venue, 1-4.*

Practice in Trial Court.

Pendency of another suit. See *Abatement, 1.*
Partition of estate. See *Administration, 1.*
Collateral attack on sale. See *Administration, 2.*
Presumption in support of judgment. See *Administration, 3.*
Authentication of claim. See *Administration, 5, 6.*
Right to sue for property of estate. See *Administrator, 1.*
Jurisdiction of court. See *Amount in Controversy, 1-5.*
Misconduct of counsel. See *Argument of Counsel, 1, 2, 3.*
Exceptions authenticated by bystander. See *Bill of Exceptions, 1.*
Readiness for trial. See *Continuance, 1, 2.*
Taxation of costs. See *Costs, 1.*
Examination of witness. See *Cross-Examination, 1.*
Property rights of husband and wife. See *Divorce, 1.*
Condemnation proceeding. See *Eminent Domain, 1.*
Resignation of executor. See *Executors, 1.*
Failure to make finding. See *Findings, 1.*
Bill of exceptions after adjournment. See *Findings, 2.*
Enforcement of mortgage. See *Foreclosure, 1, 2.*
Bond for garnishment. See *Garnishment, 1.*
Bill of review. See *Guardian and Ward, 1-7.*
Contradictory statements of witness. See *Impeachment of Witness, 1, 2.*
Equitable remedies. See *Injunction, 1-8.*
Charge to jury. See *Instructions to Juries, 1-31.*
Right to intervene. See *Intervention, 1, 2.*
Reversed judgment. See *Judgments, 1.*
Failing to dispose of parties. See *Judgments, 2.*
Dismissal as to insolvent parties. See *Judgment, 3.*
Lost citation. See *Judgment, 4.*
Description of land. See *Judgment, 5.*
Amendment of judgment. See *Judgment, 6.*
Conclusiveness of judgment. See *Judgment, 7-10.*
Refusing jury trial. See *Juries, 1.*
Province of jury. See *Juries, 2.*
Previous knowledge of facts. See *Juries, 3.*
Jury wheel law. See *Juries, 4, 5.*
Newly discovered evidence. See *New Trial, 1.*
Sustaining plea to venue. See *Plea of Privilege, 1.*
Sufficiency of pleading. See *Pleading, 1-10.*
Action on express contract. See *Quantum Meruit, 1.*
Conflicting testimony. See *Question of Fact, 1, 2.*
Sale of railway. See *Receivers, 2-9.*
Permission to sue. See *Receivers, 1.*
Submission of special issues. See *Special Issues, 1-4.*
Agreement on judge. See *Special Judge, 1.*

Practice in Trial Court—*Continued.*

Survey of premises. See *Surveyor, 1.*
Suit for recovery of land. See *Trespass to Try Title, 1-4.*
Objection to evidence. See *Variance, 1.*
Place of suit. See *Venue, 1-4.*

1. When it does not appear from the record that exceptions to pleading were acted upon by the court it will be presumed that they were abandoned and they can not be renewed by objections to evidence when offered. *Openshaw v. Dean*, 499.
2. A motion to instruct a verdict for defendant upon the close of plaintiff's evidence is not of the same legal effect as a demurrer to the evidence. A demurrer to the evidence withdraws the case from the jury and submits it to the court; a motion by defendant to instruct a verdict in his favor simply calls for the judgment of the court upon the strength of plaintiff's case, with the privilege, in case the decision is against him, of proceeding to develop his defense. *Dunham v. Orange Lumb. Co.*, 268.
3. Whether counsel should be permitted, in argument, to read to the jury from decided cases, is a matter within the discretion of the trial court, and not ground for reversal unless the discretion is shown to have been abused to appellant's prejudice. *Missouri, K. & T. Ry. Co. v. Malone*, 254.

Practice on Appeal.

Jurisdiction of appellate court. See *Appeal, 1-3.*
Jurisdiction of trial court. See *Appeal, 4.*
Filing second transcript. See *Appeal, 5.*
Showing ground for reversal. See *Assignment of Error, 1-3; Briefs, 1-6.*
Error not ground for reversal. See *Harmless Error, 1, 2.*
Presumption in support of jurisdiction. See *Jurisdiction, 1.*
Findings by jury. See *Nuisance, 3.*

1. Since the passage of the law permitting trial judges to file their findings of fact and conclusions of law after the adjournment of the court for the term, a party appealing from the judgment is not required to make and enter of record exceptions to such findings. Exceptions to the judgment when rendered is sufficient to support objections to the conclusions filed by the court. *Bond v. Garrison*, 620.
2. Because of the increasing frequency of the requests to grant a rehearing and award a writ of certiorari to perfect the record on appeal, a determination is expressed to adhere more closely to the wholesome rule of refusing such motions when the defect is caused by the carelessness of the parties to the appeal. *Houston & T. C. R. Co. v. Parker*, 377.
3. The rule of practice is well settled that it is too late after a case is submitted and decided by the appellate court to suggest a diminution of the record, thereby involving the court in a reconsideration of the entire case. *Sanders v. Eastland Ind. Sch. Dist.*, 53.
4. An appealed case was dismissed by the appellate court for the want of prosecution; upon motion of appellant the dismissal was set aside, briefs were filed, the case considered and the judgment affirmed; the court affirmed the judgment because the assignments of error raised questions that could not be considered in the absence of a statement of facts, and there was no statement of facts in the record; in the motion for rehearing as to the last judgment, the only excuse offered for failure to incorporate the statement of facts in the record was inadvertence of counsel; the motion was not sworn to. Held, the motion for rehearing should be overruled. *Id.*
5. On appeal the jurisdiction of the trial court over the case must be determined by the record. Evidence aliunde can not be received in the Court of Civil Appeals under art. 998, Rev. Stats., except to determine matters of fact affecting its own jurisdiction. *Texas & P. Ry. Co. v. Hood*, 363.
6. An action for injury to live stock in transportation was commenced in Justice Court by written petition itemizing damages aggregating more than $200, as shown by the record. On appeal from a judgment ren-

Practice on Appeal—*Continued.*

dered on appeal in the County Court, the Court of Civil Appeals refused certiorari to bring up the original petition on allegations that the items originally showed a claim for only $200, which was amended in the County Court by interlineations made by consent, increasing the amount of certain items claimed, and reversed and dismissed the case, holding themselves bound by the record which showed a claim beyond the jurisdiction of the Justice Court. In the opinion of Mr. Justice Hodges such amendments in the County Court would have the same effect if established. *Id.*

7. Abandoned pleadings as such form no part of the pleadings necessary or proper to be incorporated in the transcript on appeal, and the appellant may be charged with the cost of incorporating them. And so of improper bills of exception and cross assignments of error. *Baum v. McAfee*, 55.
8. Neither the statute nor the rules contemplate that cross assignments of error should be incorporated in the transcript on appeal. *Id.*
9. In the absence of a brief for appellee the appellate court may take as true the statement from the record in appellant's brief as to the evidence and that it constitutes all the evidence in support of the verdict. *Wetzell v. Satterwhite*, 1.
10. A Court of Civil Appeals will not decide a question not raised in the trial court. *State v. Adams*, 494.
11. An objection to the admission of evidence not made in the trial court will not be considered on appeal. *Houston Elec. Co. v. Faroux*, 232.
12. Where neither the bill of exceptions to the overruling objection to evidence nor the statement of facts show what the testimony was nor that it was actually received, no ground for reversal is shown. *Mounce v. Crowson*, 533.
13. To justify an appellate court in setting aside the verdict of a jury on the ground that it is against the preponderance of the evidence, it must be so against the overwhelming preponderance of the evidence as to be clearly wrong. *Pratt v. Slade*, 531.
14. Where on appeal no complaint is made of the amount of the verdict and judgment, assignments of error based upon the admission and exclusion of evidence as to the amount of damages will not be considered because immaterial. *Baldwin v. City of San Antonio*, 262.
15. An erroneous charge in favor of appellee is cause for reversal unless it affirmatively appears that it did not influence the jury. *Williams Ld. Co. v. Crull*, 345.
16. The maintenance of a cotton gin being adjudged a nuisance by the findings of the court, but recovery erroneously denied on the ground of estoppel of plaintiff and acquirement of a right by prescription by defendant, the court, reversing the judgment, decline to render in favor of plaintiff on the findings, remanding the case for trial on the issue of what would constitute an abatable nuisance under the principles here announced on that subject. *Gose v. Coryell*, 504.
17. When it appears from the record on appeal that appellee's case is not fully or properly developed, and that upon another trial other and competent evidence might be introduced, judgment will not be rendered against him upon reversal of the judgment of the trial court, but the cause will be remanded for a new trial. *Openshaw v. Dean*, 499.

Preferred Creditors.

Sale by insolvent debtor. See *Fraud, 1, 2, 3.*

Prescription.

Way across vacant lot. See *Easement, 1, 2.*
Right to maintain nuisance. See *Nuisance, 6.*

Presumption.

In support of judicial sale. See *Administration, 2, 3.*
As to effect of judgment in bankruptcy. *See Bankruptcy, 1.*

Presumption—*Continued.*

As to ownership of goods. See *Carriers of Goods, 1.*
Of negligence from derailment. See *Carriers of Passengers, 1.*
In support of jurisdiction. See *Jurisdiction, 1.*
Of causal connection. See *Negligence, 4.*
Of abandonment of demurrer. See *Practice in Trial Court, 1.*

1. It is not permissible to base one inference upon another. *St. Louis S. W. Ry. Co. v. McIntosh & Carlisle,* 570.

Principal and Agent.

See, generally, *Agency, 1.*

Principal and Surety.

1. When one for a valuable consideration becomes a surety on promissory notes at the time they are executed, and agrees that payment of said notes might be extended without notice to him and without affecting his liability, and subsequently, for the purpose of protecting himself against probable loss, is instrumental in having the makers of the notes sell and transfer to a third party the property for the purchase money of which the notes were given and extension of time of payment granted by the holder of the notes to the party assuming the payment of said notes, such surety will not be discharged by an extension of time of payment granted by the holder of the notes to the party assuming their payment. *Trotti v. Gaar, Scott & Co.,* 433.

Privileged Communication.

Of client to attorney. See *Evidence, 2.*

Proximate Cause.

1. In a suit for damage to a crop of rice caused by rendering the water used for irrigating unfit for that purpose, charge of the court upon proximate cause, considered and approved. *Bigham Bros. v. Port Arthur C. & Dock C.,* 367.

Public Lands.

Ratification of sale. See *County School Land, 1.*

Public Policy.

Contract to acquire title by limitation. See *Contract, 6.*

Public Roads.

Injunction against opening. See *Costs, 1.*

1. Evidence of use of a road by the public for many years, its survey by a jury of view, and the subsequent appointment of overseers and improvement as a highway by the authorities, was sufficient, as against one enclosing it, but making no proof of title in himself, to make a prima facie case that it was a public road, though not shown to have been established by the methods recognized by law. *Ballard v. Bowie County,* 438.
2. A public road can only be changed in the manner provided by law and by the Commissioners' Court. (Rev. Stats., arts. 4672, 4696). Proof that a part of it was enclosed by one claiming title and that thereafter the line as changed by the enclosure was worked and bridged under the direction of the Commissioner of the precinct, did not establish such lawful change. *Id.*
3. The evidence being held sufficient to show prima facie the establishment of a first-class road, the action of the Commissioners' Court in ordering the removal of obstructions to same for the width of forty feet, the minimum legal width for a road of such class, was proper. *Id.*

Purchase Money.

Lien for. See *Harmless Error, 2; Vendor and Purchaser, 4-7, 9.*

Purchaser.

Without notice. See *Innocent Purchaser, 1, 2.*
Repudiation of contract. See *Infancy, 1, 2.*
Notice of unrecorded deed. See *Notice, 2, 3, 4.*
Undivided interest. See *Partition, 1.*
Of real property. See *Vendor and Purchaser, 1-9.*

Quantum Meruit.

1. Where an action is based on an express contract, a charge permitting a recovery on quantum meruit is reversible error. *Williams Ld. Co. v. Crull,* 345.

Question of Fact.

Contributory negligence. See *Negligence, 5, 7.*

1. The mere fact that the testimony of witnesses upon an issue is conflicting and appears to preponderate in favor of one side will not authorize the trial court to take the case from the jury. *Pullman v. City of Houston,* 48.
2. It is peculiarly the province of the jury to determine issues of fact when the evidence is conflicting. Evidence reviewed in a damage suit for personal injuries caused by the derailment of a street car, and held sufficient to support the verdict for the plaintiff although diametrically opposed to the evidence introduced by the defendant. *Houston Elec. Co. v. Faroux,* 232.

Question of Law.

Sufficiency of proof of easement. See *Easement, 1.*
Contributory negligence. See *Negligence, 6.*

Railways.

As common carriers. See *Carriers of Goods, 1-3; Damages, 9-13.*
As passenger carriers. See *Carriers of Passengers, 1-4.*
Effect of jar on other passengers. See *Evidence, 8.*
Explaining delay in train. See *Evidence, 17, 18.*
Opinion as to probable conduct. See *Evidence, 21.*
Equipment of engine. See *Evidence, 27.*
Killing stock. See *Instructions to Juries, 11, 12, 13.*
Causal connection with overflow. See *Instructions to Juries, 20.*
Employment of incompetent servant. See *Instructions to Juries, 24.*
Connection of injury with derailment. See *Instructions to Juries, 25.*
Contributory negligence of deceased. See *Instructions to Juries, 28.*
Permitting Johnson grass to mature. See *Instructions to Juries, 30.*
Assuming defendant's negligence. See *Instructions to Juries, 31.*
Amending judgment of condemnation. See *Judgment, 6.*
Negligence of express company. See *Master and Servant, 1.*
Assault by servant. See *Master and Servant, 2, 3.*
Authority of brakeman. See *Master and Servant, 4.*
Nonenforcement of rule. See *Master and Servant, 5.*
Admission by servant. See *Master and Servant, 6.*
Concurring negligence of fellow servant. See *Master and Servant, 7, 29.*
Injury by fellow servant. See *Master and Servant, 8, 9.*
Employment of incompetent servant. See *Master and Servant, 12.*
Safe place to work. See *Master and Servant, 13.*
Scope of servant's duties. See *Master and Servant, 14.*
Knowledge of master's negligence. See *Master and Servant, 15.*
Danger signal. See *Master and Servant, 16.*
Duty to warn of danger. See *Master and Servant, 18-21.*
Knowledge and complaint of defect. See *Master and Servant, 32, 33.*
Promise to repair defect. See *Master and Servant, 34, 35.*
Statute on assumed risk. See *Master and Servant, 36.*
Causal connection with injury. See *Negligence, 1, 3, 4.*
Res ipsa loquitur. See *Negligence, 2.*
Burden of proof. See *Negligence, 5.*
Unquestioned contributory negligence. See *Negligence, 6.*

Railways—*Continued.*

Same a question of fact. See *Negligence, 7, 8.*
Person insensible on track. See *Negligence, 9-13.*
Injury to infant. See *Negligence, 16.*
Collision at crossing. See *Negligence, 17, 18.*
Collision with cars on side track. See *Negligence, 14, 15.*
Explosion of engine. See *Negligence, 19, 20, 21.*
Suit by owner of grass burned. See *Parties, 1.*
Allegations as to how injury was received. See *Pleading, 7, 8.*
Diminished earning capacity. See *Pleading, 9.*
Allegations of negligence. See *Pleading, 10.*
Right to sue receiver. See *Receivers, 1.*
Sale of road by receiver. See *Receivers, 2-9.*
Tram road of lumber company. See *Venue, 4.*

1. A tram-road upon which steam locomotives and log cars and ordinary flat cars were operated by a lumber company for the exclusive purpose of hauling logs to its mills, is a "railroad" within the meaning of article 3017, Rev. Stats., concerning the liability of persons or corporations operating a "railroad" for injuries to their employees resulting in death. Receivers of Kirby Lumber Co. v. Ownes, 56 Texas Civ. App., 370, followed; Ott v. Johnson, 101 S. W., 534, overruled. *Rice & Lyon, Receivers, v. Lewis,* 273.
2. A city ordinance imposing upon a railway regulations in regard to the use of its own property as a condition of a grant of certain rights by the city, is ineffective where the ordinance was not accepted by the company. *Sutor v. International & G. N. R. Co.,* 73.
3. A contract between connecting lines of railway for the transportation of the traffic and operation of the trains of one over the line of the other considered and held neither to constitute a partnership, nor such joint operation as would render the connecting line liable for a loss of cotton shipped on contract with and from a station on the line of the other, in the absence of proof that it reached or was carried over such connecting line. *Galveston, H. & H. Ry. Co. v. Pennefather & Co.,* 636.
4. A contract between connecting railways held to be, in effect, a trackage arrangement for the operation of the trains of one over the track of the other for a compensation based on the cost of maintenance and service and proportionment to the total "wheel miles" of the respective companies over the track, which would not render the owning company liable upon contracts of the other for through transportation of freight originating on the other's lines carried upon its contract and transported by it over the connecting track in its own trains. But if such contract made the two roads partners or joint carriers of goods, it was only as to property reaching and carried over the track in question; and where the shipment was not shown to be billed or routed over such connection or to have actually reached or been carried over it, or the loss to have occurred thereon, such connecting road was not liable. *Id.*
5. In a suit against a railroad company for the value of mules struck and killed by one of defendant's trains, and wherein the defendant contended that the place where said mules were killed was within the switch limits and it was therefore not required to fence its track at said place, charge of the court considered and approved. *Texas Cent. R. Co. v. Hico Oil Mills,* 330.
6. In a suit against a railroad company for the value of animals struck and killed by one of its trains, the plaintiff alleged that the defendant was negligent in failing to provide a sufficient headlight and in failing to keep a proper lookout to avoid killing the animals; the defendant answered and contended that its employees exercised ordinary care to avoid killing the animals; the court charged the jury that the burden was on each party to establish his contention by a preponderance of the testimony. Held, said charge was erroneous in that it placed upon the defendant the burden of establishing by a preponderance of the evidence the negative of plaintiff's allegations of negligence. *Id.*
7. A verdict against a railroad company for killing a horse within the switch limits of a town where the track could not be fenced, could not be

Railways—*Continued.*

sustained when the evidence failed to show when the horse got upon the track, or whether, from the view point of those operating the train, its approach to the track was discoverable in time to have avoided the injury; and this, though the whistle was not sounded nor the bell rung, and the train passed through the town at a high rate of speed; and it was undisputed that the train killed the horse. There was no causal connection shown between the acts of negligence and the injury. *Gulf, C. & S. F. Ry. Co. v. Bennett,* 321.

8. The duty of blowing the whistle or ringing the bell at road crossings is imposed for the benefit of those who are using or about to use the crossing. In the matter of killing live stock those signals are immaterial except as they may bear on the question of care on the part of the train operatives to avoid injury to the stock. *Id.*

9. Since locomotive engines often burn oil instead of wood or coal, it can not now be taken as a matter of common knowledge, if it ever was, that all such engines emit sparks capable of setting fire to adjoining buildings, nor to what distance dangerous sparks can be carried from them. *St. Louis S. W. Ry. Co. v. McIntosh & Carlisle,* 570.

10. In the absence of proof that a locomotive passing a house sixty-five or seventy feet from the track half an hour or more before fire was discovered therein emitted sparks in its operation, or of the character of fuel used in the engine, its mere passage and the subsequent discovery of the fire were insufficient to support an inference that such fire was communicated from the engine. *Id.*

11. In a suit against a railroad company for the value of grass burned by sparks from its locomotives, the court charged the jury as follows: "If from the evidence you believe that the defendant failed to equip its engines, from which the sparks escaped which caused the fire, with the most approved spark arrestors in use; or that the employees of the defendant operating said engines were guilty of negligence in failing to use ordinary care to prevent the escape of sparks, then and in that event the prima facie case above mentioned is not rebutted." Held, error, in that (1) it imposed upon the defendant the absolute duty of equipping its engines with the most improved spark arresters, whereas the exercise of ordinary care in that respect was the measure of its duty; and (2) it assumed that sparks did not escape from defendant's engines and set fire to plaintiff's grass, which was a controverted fact. *Texas & P. Ry. Co. v. Wooldridge & Hamby,* 384.

Ratification.

Of illegal sale of land. See *County School Land, 1.*

Receivers.

Of illegal sale of land. See *County School Land, 1.*

1. An action against a receiver of a railway upon a cause of action not growing out of his acts, but originating in transactions of the company prior to his appointment, can only be brought by leave of the court in which the receivership is pending. *Galveston, H. & H. R. Co. v. Pennefather & Co.,* 637.

2. A railway in the hands of a receiver, sold under the foreclosure of a mortgage securing its bonds after having been operated by the receiver at a loss, failed to bring enough to pay claims for expenses of its operation, of various kinds, and the receiver's certificates issued under authority of the court for money borrowed to discharge liens of laborers and material men. Held:

(1) Various claims, such as for fuel, car rentals, rentals of terminal facilities, loss of cars and freight by fire, labor, rolling stock, traffic balances due other roads, injuries to person or property by the receivers' torts, etc., are held properly adjudged by the court to be expenses of operation and given precedence in payment over the claims of the bondholders.

(2) The proceeds of special property of others sold by the receiver and of special funds deposited with him, such as by shippers for cotton

Receivers—*Continued.*

concentration, converted by the receiver and used in the operation of the road, gave rise to claims for torts of the receiver similar to demands arising out of negligence in operation and were properly given precedence as operating expenses over the claims of bondholders.

(3) Claims for operating expenses have precedence of payment out of the net profits of operation; and if these are wanting or insufficient the court may give them precedence over bondholders as to payment out of the corpus of the property on sale; but this is not a right given by operation of law and is dependent on the order of the court fixing precedence.

(4) The priority of payment as between claims for operating expenses and those for receivers' certificates for money borrowed, is controlled and determined by the orders of the court classifying claims and ordering the issuance of the certificates.

(5) An order of foreclosure and sale of a railway in the hands of a receiver classified the claims as follows: A, operating expenses payable from the earnings, and these failing, payable first from the proceeds of sale of the property. Other claims were assigned to classes B, C, D and E, and given priority of payment out of the proceeds of sale in that order. To class B certain labor liens, and to class C certain material men's liens, to class D bonded indebtedness, and to class E unsecured indebtedness, all arising prior to the receivership, were assigned by the same order, and jurisdiction was reserved to adjudicate other demands. Sale under the order was not made for some four years, the receiver continuing to operate the road. Meantime receiver's certificates to the amount of $150,000 were issued and sold under order of the court for money to pay claims originating before the receivership, allowed and assigned to classes B and C, and the certificates given a first lien on the property with the same classification as the claims they were sold to pay. Such order gave priority of payment over the receiver's certificate to claims for operating expenses of the receiver, which were by the previous decree, which constituted the final judgment in the case, assigned to class A. The order authorizing the certificates recited a necessity for paying the claims before a sale of the road, contemplating its continued operation and the incurring of future operating expenses having precedence over the certificates, of which the purchasers were bound to take notice.

(6) An order to the receiver to make no more improvements and confine operating expenses to 80 percent of the gross earnings was a mere economic direction to the receiver not affecting the validity or classification of claims of persons thereafter furnishing supplies or labor to the receiver as fixed by a previous judgment of foreclosure and classification.

(7) Having fixed in its order of foreclosure, which was the final judgment and not set aside, the classification of existing claims and of those to arise from future operation, it was error for the court to refuse afterwards to direct their payment in accordance with such classification.

(8) An order classifying claims of certain interveners for debts of operation did not prejudice the rights of the holders of receiver's certificates which by the terms of the court's judgment had been postponed in their lien to operating expenses.

(9) An order fixing the salaries of the receiver and his attorney and the master in chancery may be modified by subsequent interlocutory orders allowing extra compensation, and persons whose claims were postponed to those of the cost of receivership have no ground of complaint because the salary first fixed was exceeded.

(10) The clerk of the court could be paid, as part of the costs of the receivership, for special services performed by him, and not required by law as part of his official duties.

(11) Persons furnishing supplies for the operation of the road are not estopped from claiming precedence of payment over receiver's certificates by their knowledge of and failure to object to their issuance. *St. Louis Union Tr. Co. v. Texas So. Ry. Co.*, 157.

Receivers—*Continued.*

3. A railway having been placed in the hands of a receiver and ordered sold under foreclosure of the mortgage of bondholders, the decree classified the claims entitled to payment from the proceeds in order of priority as follows: A, operating expenses and costs; B and C, claims for labor and for supplies furnished the company prior to the receivership and certificates for money borrowed to pay such claims. An intervener on a claim for engines and cars sold the company obtained judgment with foreclosure of his lien on the property sold. The operation by the receiver continuing, a subsequent order found the property necessary to the operation of the road and directed the payment out of the earnings, making it a claim under class A as operating expenses, and it was partly paid out of the earnings. The property was then sold under the bondholder's foreclosure free from the intervener's lien. In a controversy over the right to priority of payment out of the proceeds between the intervener and holders of receiver's certificates (class B and C) it is held that the court should have directed the payment of the balance of intervener's claim out of the proceeds of the sale of the road, as part of the expenses of operation having priority over the receiver's certificates. *St. Louis Union Tr. Co. v. Texas So. Ry. Co.*, 176.
4. Claims of other railways against a receiver operating a railroad for rentals of and damages to their cars in his hands were properly allowed as operating expenses and given such priority of payment out of the receipts or proceeds of sale of the corpus of the property as by the judgment of foreclosure had been assigned to claims of that class. *St. Louis Union Tr. Co. v. Texas So. Ry. Co.*, 181.
5. Claims against a receiver were filed by interveners in the suit and referred to a master in chancery for adjudication and by him reported back, with the amounts, as creditors of the receiver. In the absence of other findings on the subject, this was to be taken as an adjudication by the master of the validity of such claims. *Id.*
6. Claims of interveners against the receiver having been referred to a master in chancery and he having included them in his report to the court of obligations of the receiver, other parties, if entitled to contest the allowance of such claims, could do so only on exception to the master's findings and notice and opportunity given claimants to be heard. A mere objection to the priority of payment given them did not raise the question of their validity as to amount. And an order of the court reducing the amount allowed, without contest made or notice to claimants, was erroneous. *Id.*
7. A railway having been sold under foreclosure of the bondholders' mortgage, question arose as to priority of payment (between holders (1) of a claim for price of land sold the company for right of way secured by vendor's lien; (2) of receiver's certificates for money borrowed to pay off wages due laborers by the company and secured by laborers' lien; (3) of like certificates to pay off liens for supplies and materials furnished the company) out of so much of the price realized on the foreclosure sale as was proportionate to the part of the road to which the vendor's lien attached (25¼ percent). Held, that by the order authorizing the issuance of the certificates, these took priority such as was given to the debts discharged by their proceeds; that the laborers' liens were superior to the vendor's liens and were to be first paid; that the vendor's lien was next and took precedence of so much of the certificates as went to pay material men's claims; that as to a surplus derived from a sale of the certificates which the receiver used for operating expenses it was to be assigned to the rank of the laborers' or material men's liens respectively, in proportion to the amount of each which was actually paid off; that the attorney's fee provided by contract for the holder of the vendor's lien took the same lien as his debt. *Hubbell, Intervener, v. Texas So. Ry. Co.*, 185.
8. A deed of trust securing railway bonds provided for payment by the mortgagee of reasonable compensation for the trustee's services and expenses and fees to his attorneys in case of suit for foreclosure. An order of the court fixing an allowance for such compensation and fees is held

Receivers—*Continued.*

to be made in the enforcement of such contract right, and not on any equitable ground which would give the sum allowed precedence of payment as costs of suit. *Orient Trust Co. v. St. Louis U. Tr. Co.*, 193.

9. A judgment of foreclosure of a deed of trust securing railway bonds classed the claims to be satisfied thereby as follows: A, operating expenses; B, labor liens; C, liens for materials furnished; D, bonded indebtedness; E, unsecured claims. Held, that an allowance of compensation to the trustee and his attorneys, made by the court in pursuance of the right thereto given by the deed of trust, did not take precedence, as operating expenses or costs, over receiver's certificates issued for money to pay claims assigned to classes B and C, and given the same priority as the claims discharged. The right to such allowance rested on the mortgage contract and was postponed to claims having precedence of those secured thereby. *Id.*

Recitals.

Of service in judgment. See *Citation, 1, 2.*
Of former conveyance in deed. See *Evidence, 6.*

Reconvention.

As affecting jurisdiction. See *Amount in Controversy, 2.*
Offsetting tort with tort. See *Offset, 1, 2.*

Record.

Failing to show jurisdiction. See *Appeal, 4.*
Time for filing transcript. See *Appeal, 5.*
Presumptions in face of. See *Jurisdictions, 1.*
Curing defects in. See *Practice on Appeal, 2, 3, 4.*
Evidence aliunde. See *Practice on Appeal, 5, 6.*
Abandoned pleadings. See *Practice on Appeal, 7.*

Record of Title.

Purchaser without notice. See *Innocent Purchaser, 1, 2.*
Notice to attorney. See *Notice, 1.*
Possession as notice. See *Notice, 2, 3, 4.*

Rehearing.

Inadvertence of counsel. See *Practice on Appeal, 4.*

Release.

Of surety by extension of time. See *Principal and Surety, 1.*

Remand.

On reversal of judgment. See *Practice on Appeal, 16, 17.*

Rendering Judgment.

On reversal. See *Practice on Appeal, 16, 17.*

Rents.

Assignment of. See *Agency, 1.*
Recovery of. See *Trespass to Try Title, 4.*

Reputation.

In issue by imputation by fraud. See *Evidence, 23.*

Res Adjudicata.

Judgment of nonsuit. See *Judgment, 7, 8.*
Judgment held not a bar. See *Judgment, 9.*

Rescission.

Notice of intention. See *Vendor and Purchaser, 2.*
Remedy not favored. See *Vendor and Purchaser, 3.*
Right denied. See *Vendor and Purchaser, 4, 5.*
Offer to do equity. See *Vendor and Purchaser, 6.*

Res Gestae.

Contemporaneous statement. See *Evidence, 13.*
Admission by servant. See *Master and Servant, 6.*

Res Ipsa Loquitur.

Statement of rule approved. See *Negligence, 2.*
Not applicable to pleading. See *Pleading, 4, 5.*

Revocation.

Of agency by death of principal. See *Powers, 5, 6, 8.*

Rivers.

When navigable. See *Navigable Waters, 2, 3, 4.*

Roads.

Injunction against opening. See *Costs, 27.*
Recognition and use. See *Public Road, 1, 2, 3.*

Sales.

Evidence showing completed agreement. See *Contract, 1.*
Place of performance. See *Contract, 4, 9.*
Time of performance. See *Contract, 5.*
Mistake in order. See *Contract, 12.*
Mortgage or absolute sale. See *Conversion, 1; Damages, 1.*
Purchaser organizing new company. See *Corporation, 1.*
Ratification of illegal sale. See *County School Land, 1.*
Sale of timber. See *Deed, 1.*
Refusal of consignee to pay. See *Estoppel, 2.*
By trustee after foreclosure barred. See *Foreclosure, 1.*
Adjustment of equities. See *Foreclosure, 2.*
Preference of creditors. See *Foreclosure, 1, 2, 3.*
Exempt property. See *Homestead, 1-15.*
Specific tract sold by joint owner. See *Partition, 1.*
By executors under will. See *Powers, 1, 2, 3; Wills, 1.*
By trustee under deed of trust. See *Powers, 4-8.*
By receiver of railway. See *Receivers, 2-9.*
By parol by possession with improvements. See *Statute of Frauds, 1.*
Of real property. See *Vendor and Purchaser, 1-9.*

1. A contract for sale of specific lumber in the hands of the seller to be shipped to the purchaser and be paid for by him in the future, is held to evidence a completed sale by which the lumber became the property of the purchaser. *Ogburn-Dalchau Lumb. Co. v. Taylor*, 442.
2. The seller of personal property on the refusal of the buyer to receive same may elect between the remedies open to him: (1) Hold the property as the purchaser's and sue for the contract price (for which he would have a lien on the property); (2) sell it to another and recover the difference between the contract price and that obtained (by which his lien against the first purchaser would be lost); (3) keep the property as his own and recover the difference between the market and the contract price. But the buyer can not elect one alternative as to part of the property and another as the rest, and his sale of a part to a third person was a choice which waived his lien as to all, being an election as to all of the second remedy. *Id.*
3. The resale by the seller, of property which the buyer refused to accept was an election of his remedy by suit for the difference between the price promised and that realized on resale, though the second purchaser was to store the property subject to the first purchaser's demand to deliver on the first sale. It placed delivery to the first buyer out of the seller's power, and substituted for his own the liability of another to make delivery. Especially was the seller bound by such election where other property was mingled with that transferred by the resale. *Id.*
4. When the consignee of goods breaches his contract of purchase by a refusal to accept and pay for the goods, it is the duty of the consignor

Sales—*Continued.*

to take charge of the shipment and so handle the same as to occasion the least damages to the consignee. *Ziegler v. Gerlach & Bro.*, 96.

5. In a suit for damages for breach of a contract to buy and pay for lumber of different dimensions and grades, evidence reviewed and held insufficient to support the verdict for plaintiff. *Cameron & Co. v. Matthews*, 118.

School Land.

Ratification of sale. See *County School Land, 1.*

Self-Defense.

Death in personal difficulty. See *Insurance, Life, 3.*

Service of Process.

Vouching in warrantor. See *Citation, 1, 2.*

Setoff and Counterclaim.

Offsetting tort by tort. See *Offset, 1, 2.*

Signals.

Rules of employer. See *Master and Servant, 16.*
Killing live stock. See *Railways, 8.*

Special Issues.

1. When a case is submitted to a jury on special issues, the generality of one of the questions constitutes no objection to the answer when more specific instruction was not asked. *Rogers v. Driscoll*, 415.
2. To one question, whether or not the debtor transferred the property in controversy with intent to hinder and delay his creditors, the jury answered, "No;" to another question, whether or not the debtor used the cash, or substantially all of it, received from the sale of said property in the payment of preexisting debts, the jury answered in the affirmative. Held, the answers were not inconsistent even when taken to mean that he did not so apply all of the cash. *Id.*
3. Although the special issues submitted by a trial court to the jury and the findings of the jury thereon be not in themselves sufficient to support the judgment rendered, it will be presumed, under the provisions of art. 1331, Sayles' Civ. Stats., that the additional facts required to support the judgment were found by the court, provided there is evidence in the record to sustain such findings. *Pratt v. Slade*, 530.
4. In the absence of a request for the submission of other special issues, an appellant can not complain that the issues submitted did not include all the issues in the case. *Id.*

Special Judge.

1. Where a cause was tried before a special judge by agreement of counsel for plaintiff and for such defendants as answered, but there was no evidence of such agreement by other defendants against whom judgment was rendered by default, the judgment was void as to the last named defendants. *Bomar v. Morris*, 378.

Stale Demand.

Acquiring title by limitation. See *Contract, 6.*

Statutes.

Due process of law. See *Constitutional Law, 1.*
Classification of subjects. See *Constitutional Law, 2.*
Assessment of street-paving benefits. See *Constitutional Law, 3.*
Subject embraced in caption. See *Constitutional Law, 4.*

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Article 326. Carriers of live stock. *Chicago, R. I. & P. Ry. Co. v. Crenshaw*, 239.
Article 745. Foreign Corporations. *Geiser Mfg. Co. v. Gray*, 618.
Article 1015. Injunction—Appeal. *C. B. Live Stock Co. v. Parrish*, 386.
Articles 1069, 1077. Special Judge. *Bomar v. Morris*, 380.
Article 1149. Venue. *Ogburn-D. Lumber Co. v. Taylor*, 445.
Article 1194. Venue. *Vaughn v. Bank*, 383.
Article 1194c. Plea of privilege. *Harris Millinery Co. v. Bryan*, 482.
Article 1224. Action against partners. *Williams Ld. Co. v. Crull*, 346.
Article 1278. Continuance. *Sullivan-Sanford Lumber Co. v. Cooper*, 540.
Article 1331. Special issues. *Pratt v. Slade*, 533.
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Article 1383. Appeal. *Houston & T. C. Ry. Co. v. Parker*, 377.
Articles 1425, 1438. Taxing Costs. *Pickerell v. Irby*, 53.
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Article 2799. Guardians. *Nicholson v. Nicholson*, 359, 360.
Article 2898. Injunction. *Holbien v. De La Garza*, 127.
Article 2972. Husband and wife. *Burns v. Burns*, 550, 551.
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Article 3017. Injuries resulting in death. *Houston & T. C. Ry. Co. v. Wells Fargo Co.*, 244; *Sullivan-Sanford L. Co. v. Cooper*, 542.
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Article 3106. Usury. *Long v. Moore*, 583, 584.
Articles 3390, 3393. Local option election. *Coats v. Blanding*, 336.
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Article 4147. Navigable stream. *Orange Lumber Co. v. Thompson*, 568.
Article 4471. Condemnation. *Baldwin v. City of San Antonio*, 262, 263, 264.
Article 4584. Railroad Commission. *St. Louis U. T. Co. v. Texas So. Ry. Co.*, 170.
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Article 5150. Trespass to try title. *Holbien v. De La Garza*, 130.
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Article 5286. Trial of right of property. *Dorroh v. Bailey*, 255.

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Act of April 15, 1899, Laws 26th Leg., p. 105. Condemnation. *Baldwin v. City of San Antonio*, 262, 263, 264.
Act of March 27, 1903, Laws 28th Leg., p. 94. Insurance. *Scottish U. & N. Ins. Co. v. Wade*, 633, 634.
Act of April 17, 1905, Laws 29th Leg., p. 318. Collection of taxes. *State v. Adams*, 497.
Act of April 18, 1905, Laws 29th Leg., p. 378. Local option elections. *Coats v. Blanding*, 336.
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Act of April 16, 1907, Laws 30th Leg., p. 206. Appeals in injunction cases. *C. B. Live Stock Co. v. Parrish*, 387.
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Act of April 18, 1907, Laws 30th Leg., p. 249. Plea of privilege. *Harris Millinery Co. v. Bryan*, 482.
Act of May 14, 1907, Laws 30th Leg., p. 446. Filing conclusions. *Kemp v. Everett*, 399-401.
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Statutes Cited—*Continued.*

Act of April 22, 1909, Laws 31st Leg., p. 354, 355. Injunction. *Holbien v. De La Garza*, 127, 129; *C. B. Live Stock Co. v. Parrish*, 387.

Statute of Frauds.

Agreement to acquire title by limitation. See *Contract, 6.*
Preference of creditors. See *Fraud, 1-4.*

1. When, to take a verbal sale of land out of the operation of the statute of frauds, a party relies upon possession taken and improvements made, it must be shown that such possession was taken and improvements made during the life of the vendor and under such circumstances as to afford a presumption that he knew of and acquiesced therein; and this rule can not be affected by the fact that the party claiming under the verbal sale had an absolute deed to the premises when it was admitted that the deed was in fact a mortgage. *Openshaw v. Dean*, 498.

Statutory Construction.

Prospective operation. See *Usury, 2.*

1. The construction of a statute should not always be controlled by the terms of an emergency clause attached thereto. The purpose of an emergency clause and the lack of any necessity that it should be clear and specific in its terms precludes the idea that there was any intention that it should have the effect of limiting the terms employed in the body of the Act. *Rice & Lyon, Receivers, v. Lewis*, 274.

Streets.

Assessment of paving benefit. See *Cities, 1-3.*
Dedication by maps and deeds. See *Dedication, 1.*
Acceptance by city. See *Dedication, 2.*
Condemnation proceedings. See *Eminent Domain, 1.*
Building encroaching on sidewalk. See *Nuisance, 2, 3.*

Sureties.

Release by extension of time. See *Principal and Surety, 1.*

Survey.

Omission of survey number. See *Taxation, 2.*

Surveyor.

1. A motion to appoint a surveyor to locate the boundaries of a tract of land in controversy must be seasonably presented. A new trial will not be granted for that purpose. *Pratt v. Slade*, 531.

Surviving Husband.

Sale under attachment lien. See *Homestead, 2.*

Taxation.

Benefits of street paving. See *Cities, 1, 2, 3.*
Costs in injunction proceeding. See *Costs, 1.*
Payment of taxes. See *Limitation, 5.*

1. The decisions which require a strict compliance with the law in regard to the assessment of land for taxes in cases of summary sales by the tax collectors by virtue of the tax rolls, should not now control under the law requiring a suit and foreclosure of the lien. If the description given in the assessment is such that by applying it to the land it can be identified, it is a substantial compliance with the requirements of the statute and the tax lien attaches. *State v. Adams*, 494.
2. Under the present law and procedure for the collection of taxes an omission by the tax assessor of the number of the survey will not invalidate the assessment, provided the land can be identified from the entire description. *Id.*
3. The Constitution requires equality of taxation; therefore whether property is valued for taxation at its full market value or at only a certain

Taxation—*Continued.*

percent of said value the same rule must be applied as to the property of all taxpayers. In a suit to enjoin the collection of taxes upon national bank stock upon the ground that the value placed upon it by the Board of Equalization was proportionately greater than that placed on other property by said Board, petition considered and held to state a good cause of action. *Langlay v. Smith*, 584.

4. The statutory requirements as to the description of land in listing it for taxation are for the protection of the owner in an attempt of the State or municipality to enforce collection. Where the owner has himself rendered it under a description identifying it and accepted by the taxing officers, the government can not complain of an omission in such requirements. *McMickle v. Rochelle*, 91.
5. The owner of a tract of land adjoining a city laid it off in blocks and lots and the city limits were extended to include it. Having sold off part of the lots, he rendered and valued the unsold portion, by acreage, as a part of the original survey, not designating it by lot and block, and this was accepted without objection by the assessor and board of equalization, and the taxes so assessed paid by the owner. A succeeding assessor, finding the lots unrendered under their description as such, placed them on the unrendered list and assessed taxes against the "unknown owner," and in suits against the unknown owners the lien was foreclosed and sale ordered, all without the knowledge of the owner. Held, that the first rendition, assessment, and payment by the owner were valid as against the city and sale of the lots under the judgment against unknown owners should be enjoined. *Id.*
6. Under article 5232 l, Revised Statutes, the owner may enjoin a sale of lands for taxes where the tax has been paid by him under a different assessment. The District Court was, it seems, without authority to decree foreclosure of the tax lien of a double assessment in such case. But, if its judgment be held not void but voidable, the proceeding by injunction was a direct attack on it and maintainable. *Id.*

Telegraph.

1. In an action for negligent failure to deliver a telegram, whereby plaintiff was prevented from attending a brother's funeral, the charge should require, as a condition for plaintiff's recovery, not only that negligence in the failure to deliver should be shown, but that if properly delivered plaintiff could and would have attended. *Western U. Tel. Co. v. Timmons*, 146.
2. A requested charge grouping the specific facts excusing a telegraph company for not delivering a message directed to one living, not at the place of address, but some miles in the country, where the company ascertained this fact, mailed the message to him, notified the sending office, and received no directions or compensation for extra expense necessary to make personal delivery, held improperly refused, though covered in general terms by the charge given. *Id.*
3. A message was transmitted to the sending telegraph office by telephone and there written out on a blank containing a stipulation for notice within ninety days, of any claim for damages, which notice was not given. Plaintiff, the addressee, had no notice of this condition, and the office refused to give him a copy of the telegram on his request. Held, that it was a question of fact whether the defendant had waived the requirement of notice or plaintiff was bound thereby. A peremptory instruction to find for defendant because no notice of the claim was given was unwarranted. *Id.*
4. A telegraph company is required to use ordinary care with respect to the delivery of a message to one beyond free delivery limits. A charge requiring this would not be taken as imposing on it the duty to make personal delivery to one living in the country without payment therefor. *Id.*
5. In view of the infectious and fatal character of yellow fever in this State in 1903, it can not be said, as matter of law, that a person of ordinary firmness, intelligence and courage would not have suffered mental an-

Telegraph—*Continued.*

guish by having to remain in a community in which the disease had appeared. *Western U. Tel. Co. v. Rich*, 395.

6. Pleading and evidence considered, and held to show a cause of action against a telegraph company for negligent delay in delivering a telegram warning plaintiff of the existence of yellow fever in a certain city and advising him to abandon an intended visit there, whereby plaintiff was caused to visit said city and forced to remain therein nineteen hours, thereby suffering mental anguish from fear of contracting the disease and from fear of being quarantined. *Id.*
7. The following message was delivered to a telegraph company for transmission: "Can get option for one twenty-five per acre for forty days putting up five hundred dollars. What must I do? Answer immediately." As delivered to sendee it read: "Can get option for seventy-five per acre," etc. To this message the sendee replied instructing the sender to close the contract. Held, the message as delivered to the telegraph company was sufficient to charge them with notice that it related to a business transaction which involved putting up $500 which might be lost by error in its transmission, and hence it could not be said that such consequence was not within the reasonable contemplation of the parties at the time the message was accepted for transmission. The fact that the parties bought the land outright instead of taking an option, was not a matter which could avail the defendants. *Western U. Tel. Co. v. Robertson*, 426.
8. While a telegraph company may limit its liability for an unrepeated message, the limitation can not be extended so as to relieve it from the consequences of its negligence. *Id.*
9. When a telegram is sent by one partner to another and in the transmission a mistake is made which results in injury to the partnership, the knowledge of the sending partner as to the correct reading of the telegram can not be imputed to the receiving partner or the partnership. *Id.*

Tender.

Sufficient to defeat rescission. See *Vendor and Purchaser*, 6.
Of attorney's fee. See *Vendor and Purchaser*, 7.

Timber.

Conveyance of. See *Deed*, 1.

Time.

For performance of agreement. See *Contract*, 5.
Term of employment. See *Contract*, 7.
Extension of note. See *Principal and Surety*, 1.

Title.

Prior possession as evidence. See *Trespass to Try Title*, 1.
Common source. See *Trespass to Try Title*, 2.
Outstanding title. See *Trespass to Try Title*, 2.

Tort.

Offsetting assault by assault. See *Offset*, 1, 2.
Joint wrongdoers. See *Trespass*, 1, 2.

Transcript.

Showing jurisdiction of trial court. See *Appeal*, 4.
Time of filing. See *Appeal*, 5.

Trespass.

Destruction of premises by fire. See *Damages*, 5.
Proof of ownership. See *Evidence*, 5.

1. The act of entering and building a fire in a house, although the same was open and unoccupied, without the consent of the owner, is a trespass and would render all parties participating therein or aiding, abetting, inciting, en-

Trespass—*Continued.*

couraging or directing the same by conduct or words, liable for the consequences proximately resulting therefrom, as, for instance, the burning of the building; and this, without regard to any question of negligence on their part. Nor did it matter that other persons on other occasions had committed trespass by entering and using the same house without the owner's consent. *Wetzell v. Satterwhite*, 1.

2. In a suit against several trespassers for the value of a house alleged to have been burned by them, evidence reviewed and held insufficient to connect appellant, one of the trespassers, with the making of a fire in the house which caused the house to burn. The mere statement by the witness that "they" or "we" did or said so and so, with nothing to indicate that it referred to all of the party, would not be sufficient to support a verdict against any particular one. *Id.*

Trespass to Try Title.

1. Facts considered and held sufficient evidence of prior possession by those whose title plaintiff had to support recovery against one holding under the same title by subsequent conveyance. *Plummer v. Marshall*, 650.
2. Land was formed by accretion to a tract granted by the State with boundary on Red River. Neither party showed title from the original grantee, both claiming under H., who had obtained a deed to it and conveyed it to M., under whom plaintiff claimed, and subsequently conveyed it to R., under whom defendants claimed. Possession was first taken under the deed to M. In an action by one holding from him, defendant, who held from R., could not defeat recovery upon plaintiff's prior deed and prior possession by proof of the original grant from the State as an outstanding title. *Id.*
3. Appellants can not complain that the judgment against them for the recovery of land is not sufficient to identify it, especially when such defect is not apparent in the face of the judgment and it follows the description in the petition, possession of which they admitted by their plea. *Id.*
4. In a suit of trespass to try title to an undivided half interest in an improved town lot, the plaintiff prayed for judgment for his interest in the lot, for partition, rents, damages, etc., the defendant answered by plea of not guilty; the court instructed the jury to return a verdict for the plaintiff for an undivided half interest in the property, and for one-half its reasonable rental value, and judgment was entered accordingly; on appeal the defendant did not complain of the judgment in so far as it adjudicated to the plaintiff an undivided one-half of the property, but only of the judgment for one-half the rents. Held, the property involved in the adjudication of the title necessarily included the improvements on the land, and in the absence of an attack on the judgment as to the title, the court properly rendered judgment for the rental value of the entire property, land and improvements; and this, though it was uncontradicted that the improvements were all made by the defendant and gave the property its rental value. The defendant should have plead his equity. *Sarro v. Bell*, 152.

Trespasser.

Proof of ownership. See *Evidence, 5.*
Putting off train. See *Master and Servant, 4.*
Person insensible on railroad track. See *Negligence, 9-13.*

Trusts.

Deed of trust on homestead. See *Homestead, 6-12.*
Conveyance in trust for wife. See *Husband and Wife, 6.*
Sale under powers of deed. See *Powers, 4-8.*

Unlawful Contract.

In sale of school land. See *County School Land, 1.*
Transactions in futures. See *Gaming Transaction, 4.*

Usury.

1. A cause of action to recover usurious interest does not exist until the interest has been actually collected and received by the payee. The recovery provided for in article 3106, Rev. Stats., can only be had in an action therefor and not necessarily by a purely defensive pleading setting up usury and payment; the right of recovery is a cause of action and not a mere defense. Therefore a judgment on a note including usurious interest can not be pleaded in bar of a suit to recover the penalty for receiving usurious interest. *Long v. Moore*, 579.
2. The Act of the Thirtieth Legislature amending article 3106 of the Revised Statutes (Gen. Laws, 1907, p. 277) is prospective, operating only upon payments of usury after the Act took effect. *Id.*

Variance.

Manner of receiving injury. See *Pleading*, 7.

1. Objection to evidence on the ground of variance should be made when the evidence is offered; the question of variance can not be raised by an instruction to the jury. *Western U. Tel. Co. v. Robertson*, 426.

Venue.

Place of performance. See *Contract*, 4.
Sustaining plea to. See *Plea of Privilege*, 1.

1. Transactions concerning a sale of lumber held not to show a lien by the seller on lumber sold which the purchaser refused to take nor a written contract by the purchaser to perform in the county. The purchaser being a resident of another county, his plea of privilege to be there sued should have been sustained. *Ogburn-Dalchau Lumb. Co. v. Taylor*, 442.
2. L. drew two drafts for different amounts upon two parties and endorsed and deposited them in a bank for collection; the bank at once placed the amount of the drafts to L.'s credit; payment of the drafts was refused; L. and the drawees resided in different counties; the bank filed suit in the county of L.'s residence against L. as endorser and guarantor and against the other parties as drawees; upon a plea of privilege by the drawees to be sued in the county of their residence on the ground that the endorsement and guaranty of L. was a simulated liability for the purpose of giving venue in the county in which the suit was brought, evidence considered and held sufficient to sustain the action of the court in overruling the plea of privilege. *Vaughn v. Farmers & M. Natl. Bank of Alvord*, 380.
3. A secret purpose on the part of the drawer of a draft to place the venue in his own county in the event the drawee refused to pay, would not affect the statutory right of venue in favor of one who cashed the draft, provided he acted in good faith; nor would such right be defeated by the mere fact that the party who cashed the draft charged it back on his books against the drawer, when this was done without the consent of the drawer when the drawee refused to pay. *Id.*
4. A tram road operated by receivers of a lumber company in the conduct of the business of the company, comes within the purview of the Act of 1901 (Gen. Laws, 1901, chap. 27) concerning the venue of suits against receivers of railroads for personal injuries, and such receivers may be sued either in the county in which the injury occurred or in the county of plaintiff's residence. *Receivers, Kirby Lumb. Co. v. Lloyd*, 489.

Vendor and Purchaser.

Suit before maturity. See *Harmless Error*, 2.
Repudiation of contract by minor. See *Infancy*, 1, 2.
Notice of unrecorded deed. See *Notice*, 2, 3, 4.
Undivided interest. See *Partition*, 1.
Sale by executor. See *Powers*, 1, 2, 3.
Sale under deed of trust. See *Powers*, 4-8.

1. Where the evidence shows affirmatively that in the contract for the sale of land the vendor did not agree to furnish to the vendee an abstract of the title, his failure to furnish such abstract was not a breach of his

Vendor and Purchaser—*Continued.*

contract to sell, and upon refusal by the vendee to take and pay for the land, the vendor was at liberty to sell to any other party. *Reina v. Hamilton*, 6.

2. It is a general rule in this State that when a vendor of land has received part of the purchase money and gives indulgence after default in payment of another part of the purchase money, there must be a demand of payment and notice of an intention to rescind the contract before advantage could be taken of the default and rescission had. *Ball v. Belden, Admr.*, 29.
3. The remedy by rescission of a contract for the sale of land is not favored, and slight circumstances, when indicative of a purpose not to insist on that remedy, may be treated as a waiver of the right. *Id.*
4. A note was given for part of the purchase money of land in 1897 and became due in 1899; the payee lived in a foreign country and it was not known by the payor where the note was kept; after the lapse of nine years demand was made by letter for payment, to which the payor replied promising to give the matter attention in a few days; thereupon payee brought suit for collection of the note, and the payor came into court and offered to pay the note, less the interest which payor claimed had been waived by the original vendor, the plaintiff then changed the suit to one of rescission and for recovery of the land. Held, the defendant was not in default and the recovery should have been denied. *Id.*
5. The mere fact that a vendee or one holding under him denies the right of the vendor to recover the full amount sued for would not give the vendor the right to rescind the contract of sale. *Id.*
6. An offer by defendant to do equity, when sued for a balance of purchase money of land, is sufficient to defeat a rescission although no money was actually paid into court. *Id.*
7. When the plaintiff in a suit upon a purchase money note does not pray for attorney's fee, a tender by the defendant need not include such fees. *Id.*
8. Where a vendor in a contract to convey land has no title at the time the contract is made, the purchaser, upon the breach of the contract, is not entitled to recover the difference between the contract price and the market value of the land, but can only recover the amount of the purchase money paid with interest from the date of the payment, together with such special damage, if any, as may have been incurred by reason of having been induced to enter into the contract; if he has not paid the purchase money, then he is confined to his special damages alone, which must be alleged and proved. *Vaughn v. Farmers & M. Natl. Bank of Alvord*, 381.
9. A note secured by a vendor's lien against the homestead having been paid by a third party at request of the maker, the latter could foreclose the lien if the transaction was a purchase of the note and transfer of it to him. If the transaction was a payment made for the purpose of discharging the lien, turning over the note by the maker to the one paying it as collateral security for other indebtedness would be the creation of a lien against his homestead and forbidden by law. *Hightower Bros. v. W. F. Taylor Co., Ltd.*, 647.

Verdict.

In former trial. See *Cross-Examination, 1.*
On special issues. See *Special Issues, 1-4.*

Vice-Principal.

Authority to hire and discharge. See *Master and Servant, 10, 11.*
Direction of foreman. See *Master and Servant, 20, 21, 30, 31.*
Injuries causing death. See *Master and Servant, 24.*
Knowledge of defects. See *Master and Servant, 32.*

Warranty.

Vouching in warrantor. See *Citation, 1, 2.*

Waste.

Constituting irreparable injury. See *Injunction, 3.*

Waters.

Canals. See *Navigable Waters, 1.*
Streams. See *Navigable Waters, 2, 3, 4.*

Watercourses.

Changed by accretion or avulsion. See *Boundaries, 4.*
Canals. See *Navigable Waters, 1.*
Rivers and streams. See *Navigable Waters, 2, 3, 4.*

Ways.

By prescription. See *Easement, 1, 2; Estoppel, 1.*

Wife's Separate Property.

Community debts. See *Administration, 4.*
Allowance for support from. See *Husband and Wife, 2, 3.*
Conveyance from husband. See *Husband and Wife, 4, 5.*
Deed to trustee for wife. *See Wife's Separate Property, 6.*

Wills.

Right to sue for property. See *Administrator, 1.*
Sales by executor. See *Powers, 2, 3.*

1. A will contained the following provisions: "I give to my executors full and ample power to sell and convey and deliver any and all of my estate, both personal and mixed, and to pass a complete title to the purchasers, and the trust above set out shall apply only to the proceeds." . . . "The time of selling the real estate I may leave is left discretionary with my executors for a period of five years." . . . "As fast as any real estate is sold by them they shall distribute the proceeds at once." . . . "Except as to the real estate, my executors shall settle up and distribute my estate as speedily as they conveniently can, and as fast as any real estate is sold by them they shall distribute the proceeds at once." Held, the executors were vested with power to sell lands belonging to the estate at any time during five years after their appointment, but not afterwards. It was not the intention of the testator that the executors must sell all the land remaining in their hands after the expiration of five years and divide the proceeds among the beneficiaries named in the will. *Wisdom v. Wilson,* 593.

Witness.

Change in testimony. See *Cross-Examination, 1.*
Subscribing witness to deed. See *Evidence, 3.*
Impeachment of. See *Impeachment of Witness, 1, 2.*

Written Instrument.

Proof of subscribing witness. See *Evidence, 3.*
Explaining technical terms. See *Evidence, 4.*
Varying consideration by parol. See *Evidence, 9.*

1. One conveying a lot to another by unqualified deed in fee simple, can not alter its effect by showing that the grantee represented that the property was to be used only in a certain way, as that it was to be left open and used only for railroad purposes, whereby the public could have access to the grantor's premises across the lot conveyed. *Sutor v. International & G. N. R. Co.,* 73.

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